Jan 13 1872

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 589.

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE, PLAINTIFF IN ERROR,

vs.

HENRY WILKINSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED JANUARY 13, 1872.

Jan 24, 1872

SUPREME COURT OF THE UNITED STATES.

No. 589.

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE, PLAINTIFF IN ERROR,

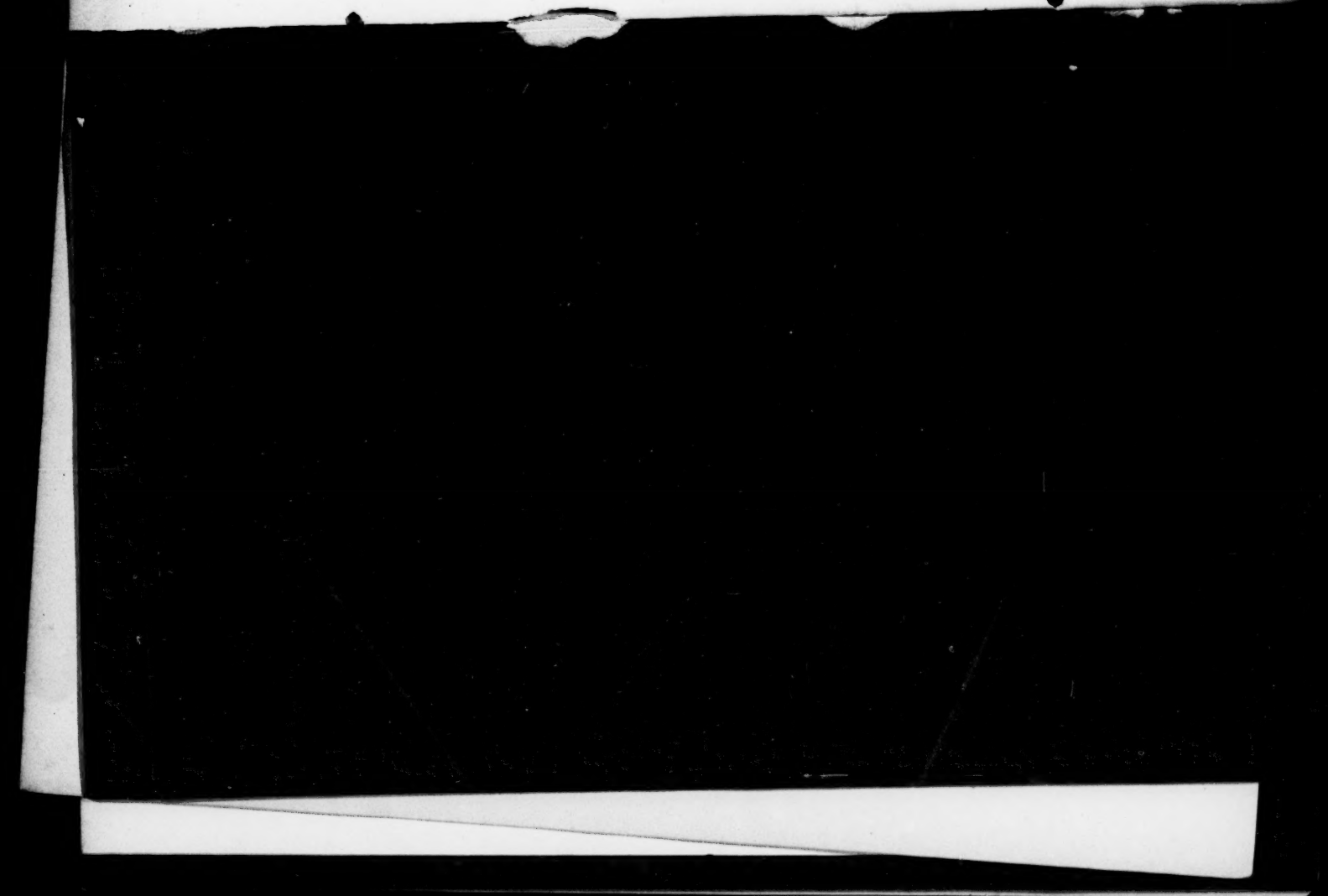
vs.

HENRY WILKINSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

INDEX

	Original.	Print.
Proceedings in circuit court Lee County	1	1
Agreement	13	18
Verdict	17	19
Motion for new trial	20	20
Judgment	21	21
Bills of exceptions	22	21
Supersedeas bond	105	30
Notice of appeal	108	31
Citation	110	31
Writ of error	111	32
Certificate	112	32



SUPREME COURT OF THE UNITED STATES.

No. 589.

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE, PLAINTIFF IN ERROR,

vs.

HENRY WILKINSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

INDEX.

	Original.	Print.
Proceedings in circuit court Lee County	1	1
Agreement	63	18
Verdict	67	19
Motion for new trial	70	20
Judgment	71	21
Bills of exceptions	72	21
Supersedeas bond	105	30
Notice of appeal	108	31
Citation	110	31
Writ of error	111	32
Certificate	112	32

3 Pleas in the circuit court of the United States in and for the district of Iowa, at a term thereof, begun and holden at the United States court-house, in the city of Des Moines, in said district, on the third Tuesday, the 17th day of October, before Honorable John F. Dillon, judge of the United States circuit court for the eight circuit, on the 4th day of November, in the year of our Lord one thousand eight hundred and seventy-one, and in the 96th year of our independence.

4 Circuit court of the United States, district of Iowa.

Be it remembered that, heretofore, to wit, on the 3rd day of May, A. D. 1871, came the Union Mutual Life Insurance Company of Maine, by Gillmore and Anderson, its attorneys, and filed in the clerk's office of said court a transcript of the record in a certain cause, wherein Henry Wilkinson was plaintiff, and the said Union Mutual Life Insurance Company was defendant, from the circuit court of the State of Iowa in and for Lee County, in said State, which said transcript is in words and figures following, to wit:

5 STATE OF IOWA, *Lee County, ss:*

Pleas before the circuit court of said county, Hon. John B. Drayer, judge; John Adair McDowell, clerk.

IN THE MATTER OF HENRY WILKINSON
vs.
UNION MUTUAL LIFE INSURANCE COMPANY OF Maine.

Be it remembered that, on the 9th day of October, A. D. 1869, their was filed in the office of the clerk of said court a petition by plaintiff, in words and figures as follows, to wit:

STATE OF IOWA, *County of Lee, ss:*

Petition.

In the circuit court at Keokuk. November term, 1869.

HENRY WILKINSON
vs.
THE UNION MUTUAL LIFE INSURANCE CO. OF Main', defendant. } Ordinary.

6 Your petitioner, Henry Wilkinson, claims of the defendant, The Union Mutual Life Insurance Company of Maine, a corporation of that name, duly organized under the laws of the State of Maine, having its directors' office in the city of Boston, in the State of Massachusetts, and having agencies and doing business as a life insurance company in the State of Iowa, the sum of two thousand dollars, ($2,000 00,) with interest thereon from the eighteenth day of April, A. D. 1869, and for cause of such claim your petitioner represents that, in consideration of the sum of thirty-three dollars and eighty cents, in hand paid by your petitioner to the said defendant, and of the annual sum or premium of thirty-three dollars and eighty cents, to be paid by

your petitioner to the said defendant on or before the first day of June in any year during the continuance of the policy of insurance hereinafter referred to, defendant assured to your petitioner the life
7 of Melinda J. Wilkinson, the then wife of your petitioner, for the sum of two thousand dollars, all of which will more fully and at large appear by reference to the said policy of insurance, which was duly executed and delivered by said defendant by its authorized agent to your petitioner, which policy of insurance will be produced in evidence in the trial of this cause, and a copy of which reads as follows, to wit:

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE.

Director's office, Boston, Massachusetts.

No. 21707.

This policy of insurance witnesseth: That, whereas Henry Wilkinson, of Keokuk, county of Lee, State of Iowa, has applied to the Union Mutual Life Insurance Company, by his application dated May 23rd, 1867, for insurance on the life of Melinda J. Wilkinson, of Keokuk, county of Lee, and State of Iowa, and has also agreed to pay the sum of thirty-three dollars and eighty cents, as the annual premium therefor, on or before the 1st day of June, in any year during the continuance of this policy—and now, the first payment of the before-mentioned annual premium having first been received by the company or their accredited agent—during the life-time and good health of the said insured, as is hereinafter provided, and not otherwise; and in consideration of such payment having been so received and of the provisions herein for future payments of premiums, the said company do hereby insure the life of Melinda J. Wilkinson aforesaid, in the amount of two thousand dollars, from the first day of June, 1867, at noon, for and during the term of her whole life for the sole and separate use and benefit of her husband, Henry Wilkinson; and the said company do hereby promise to and agree with the said assured, his executors, administrators, and assigns, well and truly to pay the said sum insured to the
9 said assured, his *his* executors, administrators, and assigns, ninety days after due notice and proof of the death of the said Melinda J. Wilkinson, during the continuance and before the termination of this policy, and of the just claim of the assured or of any other person, as executor, administrator, guardian, or assign of the assured under it: Provided especially, and this policy is made and it is accepted by the assured, and the said Melinda J. Wilkinson, upon the express condition that if the amount of any annual premiums, herein provided for, is not fully paid, with the interest due thereon, on the day and in the manner so provided for, then this policy shall be null and void, and wholly forfeited; and also that no agent of this company, except the president and secretary, can waive such forfeiture or alter this or any other condition*ed* expressed in this policy. And in case the death of the person
10 whose life is hereby insured shall be caused by risks consequent and upon the engagements and employ-

Whole term of life.

Annual premium, $33 80.

Amount insured, $2,000 00.

SPECIAL AGREEMENT: It is expressly understood and agreed, and this policy is accepted by the assured upon the condition, that if, at any time, any note, check, or draft, other than the usual premium note, for one-half of the annual premium, shall be given in payment or part payment of any premium then due or to become due for or on account of this policy, and such note, check, or draft, shall not be paid according to the premiums thereof, then this policy shall become immediately void, and the company are thereby relieved from all the obligations under it.

ment of said person in a coal mine, powder manufactory, powder transportation, railroad train, or steamboat, as fireman or engineer in a steam mill or steam factory, as an express carrier over lake or river, or the inland navigation, said company shall not be liable to pay the loss, unless liberty shall have been given to engage in such employment; which liberty, if applied for, shall be given for a fair additional premium.

Said insured life has liberty to go, and the risk is to continue on any passage by water, coastwise, as a passenger about the Atlantic and Gulf coasts of the United States, New Brunswick, Nova Scotia, and Prince Edward's Island, between any of the ports or places from the entrance to the River St. Lawrence to that of the Mississippi River, with liberty to work at any intermediate ports, and at Cuba; and also
11 liberty to go as passenger, and the risk is to continue between Europe and any of the Atlantic and Gulf coasts, ports within the limits above named, and to touch at the usual ports; said insured life also has liberty occasionally to make excursions by boat or vessel on the sea-coast or on any rivers, lakes, or ponds, for health, recreation, or sporting, provided that in case the said insured life shall die on a voyage or passage upon the high seas not permitted herein, this policy shall thereupon be void, and no loss be recoverable under it. Said insured life also has liberty to travel on the ordinary routes of inland travel by the usual modes of conveyance; also to reside and travel indefinitely in Europe, New Brunswick, Nova Scotia, Prince Edward's Island, and in Canada; this policy is also made and accepted upon condition that, except as provided herein of the said person
12 whose life is hereby insured, shall, without consent of said company, previously given in writing, pass beyond the limits of the United States, or shall, without such consent, voluntarily go to, remain, and shall remain, or shall, without such consent, voluntarily and without compulsion, or irresistible necessity, remain one week between the first day of June and last day of Oct., south of the southern boundary of Virginia; or shall, without such consent, voluntarily be and remain over one month in any part of the year west of the Rocky Mountains, or shall, without such consent, enter into any military or naval service, the militia not in actual service excepted, this policy shall thereupon be void, and in case she shall die by her own hand, whether at the time sane or insane, or in *any* consequence of a duel, or by the hand
13 of justice, or in the violation of, or attempt to violate, or in consequence of violating, or of attempting to violate the laws of the United States or of any State, country, or place, or shall become so far intemperate or addicted to any vice or habit as to seriously or permanently impair her health, or induce delirium tremens, this policy shall be null and void, and the said company shall not be liable for the loss. It is also a condition of this policy fully agreed to by the assured and the said Melinda J. Wilkinson, that if the statements made by or on the part, procurement, or behalf, or with the knowledge of the said assured to said company as the basis of, or in the negotiations for this contract, shall be found in any respect untrue, then this policy shall be null and void. And it is also a condition of this policy, accepted by the assured therein, that, in case it becomes null and void for any of the
14 above causes, or by forfeiture, or otherwise, all payments of premiums made thereon and all dividends, credits accruing therefrom, and remaining unpaid, and all appointments of profits thereto, shall also be null and void, and shall not constitute any claim against the company to any party. Any assignment of this policy shall be void

unless assented to in writing by said company. Said company shall have a right to set off any demand they shall have against said assured, his assigns or representatives, acting incidentally to or in connection with this insurance against any claim for which this company shall be liable thereon.

In witness whereof the said Union Mutual Life Insurance Company have, by their president and secretary, signed this contract at their office in Boston, this first day of June, one thousand eight hundred and sixty-seven, but the same shall not be binding until countersigned and delivered by Babcock, Clark & Co., agent' at Davenport, Iowa,
15 nor until the advance premium is paid, nor unless the party is alive and in sound health at the date of said payment.

(Signed) HENRY CROCKER, *Pres.*
W'M H. HOLLISTER, *Sec.*

Countersigned at Davenport, Iowa, this 6th day of June, 1867.
[Edition of 1867.]
(Signed) BABCOCK, CLARK & CO.,
Agents.

[United States, B. C. & Co., June 6th, 1867, revenue stamp.]

And upon the reverse side of said policy is the following, to wit:

No. of payments.	Annual payments.		Am'ts.	How.	Note & int.
	When due.	When paid.			
One.....	June 1	May 23.....	$33 80	Cash and notes for cash, $16 90.....	$16 90

Signatures of persons who received annual payments.	Charges & credits.	
	Dr.	Cr.
A. B Ball, agent	$33 80	$33 80 Cash & notes.

16 And, also, upon the back of said policy, is endorsed the following, to wit:

No. 21707. Union Mutual Life Insurance Company. Office No. 80 Washington street, Boston, Mass. Assurance on the life of Melinda J. Wilkinson. Amount, $2,000 00. Date, June 1st, 1867. Term of whole life. Payments annually due on June 1st. Annual premiums $33 80.

2nd. Petitioner shows that, up to the time of the death of said Melinda J. Wilkinson, all premiums accrued upon said policy were duly paid.

3rd. Your petitioner further shows that, on or about the second day of January, A. D. 1869, said Melinda J. Wilkinson died, and that her death occurred in the house and home of your petitioner, in the city of Keokuk, county of Lee, and State of Iowa, was not caused by any matter or thing in violation of the terms and conditions of said policy.

17 4th. Petitioner avers that he has duly performed all the conditions of said policy of insurance on his part. and that more than ninety days before the commencement of this suit, to wit, on or about the eighteenth day of January, A. D. 1869, he gave to the defendant

due notice and proof of the death of the said Melinda J. Wilkinson, as aforesaid, and demanded payment of the said sum of two thousand dollars.

4th. But your petitioner shows that said sum of money was not over paid to him nor any part thereof; whereof he claims judgment for said sum of two thousand dollars, with interest thereon, from the eighteenth day of April, A. D. 1869, and his costs.

DANIEL F. MILLER,
W. J. COCHRAN & SON,
Attorneys for Plaintiff.

STATE OF IOWA, *County of Lee, ss:*

I, Henry Wilkinson, upon my oath, lawfully admitted, depose,
18 and say that I am plaintiff in the foregoing petition, and that I am acquainted with the contents thereof, and that the statements and averments therein are true, as I verily believe.

(Signed) H. WILKINSON.

Subscribed and sworn to before me, by the said Henry Wilkinson, this 9th day of October, A. D. 1869.

CHARLES DOERR,
Clerk C. C.
By ERIE J. LEECH, *Deputy.*

Filed October 9th, 1869.

CHARLES DOERR,
Clerk C. C.
By ERIE J. LEECH, *Deputy.*

And, afterwards, there was filed in said clerk's office a notice in words and figures, to wit:

Original notice.

In the circuit court of said county, at Keokuk. November term, 1869.

STATE OF IOWA, *Lee County, ss:*

HENRY WILKINSON
vs.
THE UNION MUTUAL LIFE INSURANCE COMPANY of Maine, defendants.

19 To the above-named defendants:

You are hereby notified that a petition is now on file in the clerk's office of the circuit court aforesaid, in behalf of the above-named plaintiff, against you, and claiming judgment against you for the sum of two thousand dollars and interest, as therein stated, and costs, on account of a policy of assurance by you issued to said plaintiff, on the life of Melinda J. Wilkinson, now deceased, and unless you appear thereto and defend, before noon of the second day of the next term of said court, to be begun and holden on the 23rd day of November, 1869, default will be entered against you and judgment tendered thereon, as prayed for in said petition.

D. F. MILLER AND
W. J. COCHRANE & SON,
Attorneys for Plaintiff.

On the back of said notice is the following return:

20 "This notice came into my hands on the 15th day of October, 1869, and on the 20th day of October, 1869, I served this notice on the within-named Union Mutual Life Insurance Company of Main', by reading the same to A. B. Ball and A. Daniels, agent' of said above-named life insurance company, located at Keokuk, Iowa, and by delivering to each one of them, separately, a true copy of the same, in the city of Keokuk, Lee County, Iowa.

JOHN A. BISHOP,
Sheriff Lee County, Iowa.
By R. M. BISHOP, *Deputy.*

Fees, $1 50.

And afterwards, to wit, on the 24th day of November, 1869, there was filed in the clerk's office of said court an answer, in words and figures as follows, to wit:

In the circuit court, Lee County, Iowa.

HENRY WILKINSON
vs
UNION MUTUAL LIFE INSURANCE COMPANY.

21 Now comes defendant, by Gillmore & Anderson, their attorneys, and, for answer to the petition, they claim: That they deny they are indebted to plaintiff in the sum of two thousand dollars, or any sum; deny the policy sued on was or has been duly issued and executed by the said defendant; deny each and every material allegation, except as this answer admits the same, and for further answer, they show, that the policy sued on was obtained by fraud and misrepresentations on the part of plaintiff, and is null and void by its own tenor, and of no force or virtue against defendant. Wherefore defendant prays to be dismissed with costs.

GILLMORE & ANDERSON,
Attorneys for Defendants.

Verification waived.

McCRARY, MILLER & McCRARY,
Attorneys for Plaintiffs.

22 And afterwards, to wit, on the 12th day of November, there was filed in the clerk's office of said court, an answer in words and figures following, to wit:

Answer of defendants.

In the circuit court of Lee County, at Keokuk.

HENRY WILKINSON, PL'FF,
vs.
THE UNION MUTUAL LIFE INSURANCE COMpany of Main', defendants.

Now comes the defendant, The Union Mutual Life Insurance Company of Main', by Gillmore and Anderson, its attorneys, and for amendment to the answer heretofore filed in this cause, by leave of court first

the pe[illegible]

had and obtained, show that they deny each and every material allegation in the petition contained, except as the same is admitted in this answer; and, for further answer, they show that it is true that, on or about the 1st day of June, 1867, defendant executed and delivered to plaintiff a policy of insurance upon the life of Melinda J. Wil-
23 kinson; that said Melinda is dead, and that notice and proof of death has been made, as is provided for in said policy, but denies there is due therein the sum of two thousand dollars, or any other sum whatever. And, for further answer, they show that by the terms of the said policy of insurance, as set out in petition, it was specified and agreed, and that it is a condition of this policy fully agreed to by the assured, that if the statements made by, or in the part, procurement, or behalf, or with the knowledge of said assured, to said company, as the basis of, or in the negotiations for this contract, shall be found in any respect untrue, then this policy shall be null and void.

It was also a condition of the said policy, accepted by the assured therein, that in case the policy became null and void for any of
24 the above causes, or by forfeitures, or otherwise, all payments of premium made thereon, and all dividend credits arising therefrom and remaining unpaid, and all apportionments of profits thereto, shall also be null and void, and should not constitute any claim against the defendant. All of which more fully and at large appears by reference being had to the policy, a copy of which attached to the petition.

Now, defendant show' that plaintiff, in making application for insurance with defendant, made the same in writing, a copy of which, his said application, is attached to this answer, marked Exhibit K, and made a part hereof; and defendants show that in the said application, in the statements and declarations made by plaintiff, and by said Melinda J. Wilkinson, dated the 23rd May, 1867, the said parties in answer to questions to them propounded, and by them subscribed, to wit:
25 "Has the party whose life is proposed for insurance ever been afflicted with insanity, habitual cough, disease of the lungs, consumption, spitting of blood? if so, state the particulars;" to which said question the said parties answer "None," which said answer was false and untrue. And in answer to question 9 in said application, to wit: "Has the party ever had any serious illness, local disease, or personal injury; if so, of what nature, and at what age?" the said parties answer "No," which said answer was false and untrue. And in answer to question 10 in said application, to wit: "Has the party had scrofula, dizziness of the head, bowel-complaint, any nervous or muscular difficulty, or any severe disease during the last five years; if so, which and when?" which said parties answer "No," which said answer was false and untrue. And in answer to question 11 in said application, to
26 wit: "Is the party now afflicted with any disease or disorder whatever?" the said parties answer "No," which said answer was false and untrue. And in answer to question 15 in said application, to wit: "Are the parents of the party dead?" in the portion of the said answer in relation to the mother of said party, the said applicant answered "Yes; age at her death 40; cause of death, fever; health good till a short time before her death;" which said several answers were false and untrue.

That in answer to question 17 in said application, to wit: "Please state whether to your knowledge either of the paternal or maternal grand-parents, or any of the uncles or aunts of the party have died of or been afflicted with consumption, insanity, or any hereditary disease?" the said parties answer "No," which said answer was false and

untrue. That in answer to question 12 of said application, to wit:
27 "Name and residence of the party, usual medical attendant,
the said parties answer "Dr. Collins, of Keokuk, Iowa;" and they filed as a part of their said application, questions and answers of the said Dr. Collins; that the said Collins in his answers, as shown by said Exhibit K, and in answer to question 2 in the said questions propounded to said Dr. Collins, to wit: "Does anything in the party's figure, general appearance, manners, or conversation, indicate ill health, feeble constitution, irregular or intemperate habits, and what?" to which their said physician and medical attendant answers "No," which said answer was untrue and false. And in answer to question 3 in said questions propounded to said medical attendant, to wit: "Has their been any insanity, consumption, or hereditary disease in the party's family, (11) his grand-parents, or any of their descendant'; if so,
28 state the particulars?" to which the said medical attendant answers "No," which said answer was false and untrue. And in answer to question 5 propounded to said medical attendant, to wit: "Has the party ever spit blood, or been subject to cough, profuse expectorations, difficulty in breathing, or any other disease of the lungs? if so, state particulars;" the said medical attendant answered "No," which said answer was false and untrue. And in answer to question 6 propounded to said medical attendant, to wit: "Are the lungs in a perfectly healthy condition; is the respiration full, gentle, and regular; does percussion give a normal resonance?" in all of which several interrogatories in said question, the said medical attendant answered "Yes," which said answer was false and untrue. And in answer to ques-
29 tion 10 of the said questions propounded to said medical attendant, to wit: "Has the party had scrofula, rheumatism, gout, or dropsy, or other diseases not enumerated, or any results of mechanical injury? if so, state particulars;" to which question the said medical attendant answered "None," which said answer was false and untrue; all of which said answers are subscribed by said Collins.

Now defendants show that the questions contained in said application to the several parties, are necessary and should be answered truly, to enable the company to decide on the advisability of issuing a policy; that said questions were by said applicants answered untruly and falsely, with the object and interest of fraudulently procuring the policy upon which suit is brought; that said defendant, owing to the false,
30 untrue, and fraudulent answers, were induced to insure the said Melinda J. Wilkinson's life, supposing she was truly a person such as was physically described in said application; that the policy was procured by fraud.

Defendants further show the proposals, answers, and declarations, contain' in said application as aforesaid, were warrantees—the said Henry Wilkinson and said Melinda J. Wilkinson, having in fact, warranted the said Melinda J. Wilkinson to be a person as therein physically described; and upon the faith of the same, defendants *th*ere induced to issue the policy aforesaid, upon the consideration therein named, but would not, for said consideration, or for any consideration whatever, issue a policy upon the life of any such person as Melinda J. Wilkinson really was.

Now, defendants show that, on or about 1862, and before the
31 said application was made for the said policy was issued, the said Melinda J. Wilkinson had sustained a personal injury; that the party was, at the time of said application, *was* suffering from the effects and results of the said personal injury, occasioned by a fall from a tree;

that the mother of the said Melinda J. Wilkinson died at about the age of twenty-two, instead of the age of 40, as was falsely alleged in said application; that the said mother of said Melinda J. Wilkinson, died of consumption, instead of fever, as was falsely alleged in said application; that a brother of the mother of said Melinda J. Wilkinson, and an uncle of said Melinda J. Wilkinson, died of consumption; that the said Melinda J. Wilkinson, at the time of the said application, had consumption, and had diseases of the lungs; that she had, at same time,
32 scrofula; had diseases of uterine organs; was suffering from the effects of the fall she had had some time previous; and was, in various ways and manners afflicted, and of unsound body and health; all of which said matters were fraudulently withheld, mis'tated, and omitted, and concealed from the company as well as the facts in relation to the mother and uncle of the said Melinda J. Wilkinson, whereby defendants were induced to issue their said policy.

That the said application, signed as aforesaid by the said Melinda J. Wilkinson and said Henry Wilkinson, as more fully appears by said Exhibit K, contains the following agreement on their part, to wit: "I Henry Wilkinson, of Keokuk, county of Lee, State of Iowa, do hereby declare that the above particulars and statements are true, and
33 that I have not concealed or withheld any material circumstances or information touching the past or present state of health, or habits of life of the party whose life is proposed to be insured, or anything with which this company ought to be made acquainted; and that I have an insurable interest in the life of the party in the full sum mentioned, (viz.,) $2,000; and I do hereby agree that the above statement and this declaration shall form, and be the basis of, the contract between me and the said company for insurance on the life of the said Melinda J. Wilkinson, and that if any untrue or fraudulent allegations be contained in this proposal, which I also agree shall form and be a part of the policy, or, if anything material or important, affecting the risk applied for, which this company ought to know, has been concealed, withheld, or omitted, in the foregoing, the policy, with all moneys paid thereon, and dividends credited, shall be forfeited to the said company."

34 Now, defendants show that, by reason of the foregoing, and by agreement of the parties, the said policy has become null and void and forfeited, and defendants are not liable thereon in the amount claimed or any amount whatever.

They further show that, by reason of the fraud in the procurement of said policy, the same is null and void, and cannot constitute any claim against defendant; wherefore they pray to be dismissed with costs.

GILLMORE & ANDERSON,
Attorneys for Defendants.

35 *Exhibit K to defendant's answer.*

UNION MUTUAL LIFE INSURANCE CO. OF MAINE,
DIRECTOR'S OFFICE,
80 *Washington Street, Boston, Massachusetts.*

The following particulars and declaration are required from persons proposing to effect assurance in this company:

Ques. 1. The full name and residence of the person or persons for whose benefit assurance is proposed; giving the relation of such to the person whose life is to be insured (as wife, parent, children, creditor, or as the case may be.)

Ans. 1. Henry Wilkinson; husband; of Keokuk, county of Lee, State of Iowa.

Ques. 2. What amount of assurance is wanted? $2,000 00. For what term? Whole term of life. And on what plan or table? One.

Ques. 3. Name in full, occupation, and residence of the person whose life is proposed to be insured.

36 Ans. 3. Name, Melinda J. Wilkinson; occupation, house-work; of Keokuk, county of Lee, State of Iowa.

Ques. 4. Place and date of birth of the person whose life is to be insured; state the age next birthday; also the month and day of month.

Ans. 4. Missouri, 30th October, 1848; 19 years on the 30th day of October, 1867. "Be particular that no error occurs in these two answers."

Ques. 5 Has the party whose life is to be insured ever been intemperate? Is the party now of correct and temperate habits? Is the party married or single?

Ans. 5. No. Yes. Married.

Ques. 6. Has the party resided in the Southern States, or in foreign climates; and if so, what was the party's health during the time?

Ans. 6. No.

Ques. 7. Has the party had the small-pox, or been vaccinated?

Ans. 7. No. Yes.

Ques. 8. Has the party whose life is proposed for insurance, ever been afflicted with insanity, paralysis, bronchitis, habitual cough,

37 disease of the lungs, consumption, spitting of blood, severe colic, rupture, fits, dropsy, gout, rheumatism, asthma, apoplexy, numbness of the limbs, liver complaint, fistula, palpitation, disease of the heart, gravel, or any other urinary difficulty, or of any other of the vital parts? If so, state particulars.

Ans. 8. None.

Ques. 9. Has the party ever had any serious illness, local disease, or personal injury? If so, of what nature, and at what age?

Ans. 9. No.

Ques. 10. Has the party had scrofula, dizziness of the head, bowel-complaint, any nervous or muscular difficulty, or any severe disease during the last five years; if so, which, and when?

Ans. 10. No.

Ques. 11. Is the party now afflicted with any disease or disorder whatever.

Ans. 11. No.

Ques. 12. Name, and residence of the party's usual medical attendant.

Ans. 12. Dr. Collins, Keokuk, Iowa.

Ques. 13. Name and residence of an acquaintance to be referred to.

38 Ans 13. Sarah E. Caldwell, Keokuk, Iowa.

Ques. 14. (* See margin.) Are the parents of the party living?

Ans. 14. Fathers? Ans. No. Age at death, State of his health. Mother? Ans. No. Age, State of her health?

(* These five questions of special importance, and must be answered as fully and carefully as possible.

Ques. 15. Are the parents of the party dead? Ans. Yes. Father's age at death? Ans. Do not know the cause of death, the age, nor disease. Mother's age at her death? Ans. 40. Cause of her death? Fever; health good until a short time before her death.

Ques. 16. How many brothers has party had? Ans. One.

How many are living? Ans. One.

At what age? Ans. 23.
What is the state of their health? Good.
How many sisters? Ans. One.
Age? Five months old.

Ques. 17. Please state whether, to your knowledge, either of the paternal or maternal grand-parents, or any of the uncles or aunts of the party have died of, or been afflicted with, consumption, insanity, or any hereditary disease.

Ans. 17. No.

Ques. 18. Is the party's life insured, or has it been, for the whole term of life, at usual rates of premium; if so, in what company? Has application for insurance ever been declined by this or any other company?

Ans. 18. Three thousand one hundred dollars, at the usual rates for whole term of life, in the Conn. Mutual. No.

I, Henry Wilkinson, of Keokuk, county of Lee, State of Iowa, do hereby declare that the above particulars and statements are true, and that I have not concealed or withheld any material circumstance or information touching the past or present state of the health or habits of life of the party whose life is proposed to be insured, or anything with which this company ought to be made acquainted; and that I have an insurable interest in the life of the party in the full sum above-mentioned, (viz,) $2000 00; and I do hereby agree that the above statements, and this declaration shall form and be the basis of the contract between me and the said company for insurance on the life of the said Melinda Wilkinson, and that, if any untrue or fraudulent allegation be contained in this proposal, which I also agree, shall form and be a part of the policy, or if anything material or important, affecting the risk applied for, which this company ought to know, has been concealed, withheld, or omitted in the foregoing the policy, with all moneys paid thereon and dividends credited, shall be forfeited to the said company. And I further agree that the assurance shall not be binding until the first instalment of premium shall have been paid to said company, or an accredited agent thereof, during the life and good health of the party whose life is proposed for insurance; and that before demanding payment therefor, satisfactory proof of the death of the party whose life is hereby proposed to be insured, shall be furnished to the said Union Mutual Life Insurance Company.

Dated at Keokuk, Iowa, this twenty-third day of May, 1867.

MELINDA J. WILKINSON, *Applicant.*
HENRY WILKINSON.

Certificate of examination.

It is expected that the answer to each of the following questions will be full and explicit; that a physical examination of the chest will be made in every case, and in addition, that the medical examiner shall, in particular or doubtful cases, make examination and such other inquiries suggested in the cause of the examination, as are of consequence for the action of the company. You are therefore requested to make thorough investigation into the party's history, condition, and prospects of life, and to give the company the benefit of all the information you obtain in examination or otherwise:

Ques. 1. Of what height, (*a*,) weight, (*b*,) & girth, (*c*,) and temperament (*d*)?

42 Ans. 1. (*a*) 5 f't 4 in., ; (*b*) 114 pounds ; (*c*) 30 inches just below armpits, next to the linen, with the arms hanging down ; (*d*) nervous-bil*l*ious.

Ques. 2. Does anything, in the party's figure, general appearance, manners, or conversation, indicate ill health, feeble constitution, irregular or intemperate habits, and what ?

Ans. 2. No.

Ques. 3. Has there been any insanity, appoplexy, consumption, or other hereditary disease in the party's family, (in his grand parents, or any of their de'cendants) ? If so, state the particulars.

Ans. 3. No.

Ques. 4. Has the party had local or general paralysis, appoplexy, epilepsy, or other disease having its seat in the brain or nervous system, or any predisposition thereto ? If so, state the particulars.

Ans. 4. No.

Ques. 5. Has the party ever spit blood, or been subject to cough, profuse expectoration, difficulty in breathing, or other disease of the lungs ? If so, state the particulars.

43 Ans. No.

Ques. 6. Are the lungs in a perfectly healthy condition ; is the respiration full, gentle, and regular ; does percussion give a normal resonance ?

Ans. Yes. Yes. Yes.

Ques. 7. Has the party ever suffered from palpitations, fluttering, pains, or other inconvenience in the region of the heart ? If so, state particularly.

Ans. 7. No.

Ques. 8. Rate and general character of the pulse; are the r'ythm and impulse of the heart healthy ?

Ans. 6. 70, normal. Yes.

Ques. 9. Has the party had any disease of the liver or kidneys, dyspepsia, colic, disentery, hernia, strangury, or other disease of the abdominal viscera ? If so, state particulars.

Ans. 9. No.

Ques. 10. Has the party had scrofula, rheumatism, gout, dropsy, or other diseases not enumerated, or any results of mechanical injury ? If so, state particulars.

Ans. 10. None.

44 Ques. 11. Do you think the party will survive the term of expectation ? (Read explanation, and refer to the table in margin.)

Ans. 11. Yes.

Ques. 12. Do you consider the risk a good one ; if not, state particulars ?

Ans. 12. Life healthy, and risk advised.

Dated Keokuk, this 23rd day of May, 1867.

Examination made and signed by M. F. Collins, medical examin*ation*.

If the spaces above are insufficient, please write fully to the company your opinion in a supplementary note.

The within risk recommended by

A. B. BALL, *Agent.*

Please date the certificate the day the personal examination is actually made.

Table showing the expectation of life at every age, according to the observation made by Carlysle.

Age.	Expect.	Age.	Expect.	Age.	Expect.	Age.	Expect.
10	48.82	14	45.75	18	42.87	22	39.31
11	48.04	15	45.00	19	42.17	23	38.59
12	47.27	16	44.27	20	41.46	24	37.86
13	46 01	17	43.57	21	40.75	25	38.00

45

Age.	Expect.	Age.	Expect.	Age.	Expect.	Age.	Expect.
26	37.14	37	28.95	48	21.81	59	14.34
27	36.41	38	28.28	49	21.11	60	13.82
28	35.69	39	27.61	50	20.39	61	13.31
29	35 00	40	26.97	51	19.68	62	12.81
30	34 34	41	26.34	52	18.97	63	12.30
31	33.68	42	25.71	53	18.28	64	11.79
32	33.03	43	25.09	54	17.58	65	11.27
33	32.36	44	24.46	55	16.89	66	10.75
34	31.68	45	23.82	56	16.21	67	10.23
35	30.32	46	23.17	57	15.55	68	9.70
36	29.64	47	22.50	58	14.92	69	

(Endorsed:) Filed May 3rd, 1871. George B. Corkhill, clerk.

46 And afterwards, to wit, on the 13th day of March, 1871, there was filed in the office of the clerk of said court a petition to transfer to United States circuit court, in words and figures following, to wit:

STATE OF IOWA,
Circuit Court of Lee County:

47 HENRY WILKINSON
vs.
UNION MUTUAL LIFE INSURANCE CO., OF Maine.

To the honorable the justices of the circuit court of Lee County, Iowa, at Keokuk:

Comes the Union Mutual Life Insurance Company, the defendant in the above action, and respectfully represents that the plaintiff, in the above action, is a citizen of the State of Iowa, and that defendant's corporation is a citizen of the State of Maine and incorporated by said State of Main'; that the sum in dispute in said action exceeds the sum of five hundred dollars, exclusive of costs and that your petitioner does believe and has reason to believe that from pre'judice and from local influence, the defendant's company will not be able to obtain justice in the above-named State court, where said action is now pending. And, therefore before any final trial of the above-entitled action in said court
48 the said Union Mutual Life Insurance Company comes and prays that the above action may be removed from the said circuit court for Lee County into the next circuit court of the United States to be held in the District of Iowa, in which the suit is now pending. In support whereof the said defendant submits the following affidavits made in its behalf, by Daniel Sharp, and has caused its corporate seal to be hereto annexed.

(Signed) UNION MUTUAL LIFE INSURANCE COMPANY,
[SEAL.] By DANIEL SHARP,
Vice-President of said Co.

42 Ans. 1. (*a*) 5 f't 4 in., ; (*b*) 114 pounds ; (*c*) 30 inches just below armpits, next to the linen, with the arms hanging down ; (*d*) nervous-bil*l*ious.

Ques. 2. Does anything, in the party's figure, general appearance, manners, or conversation, indicate ill health, feeble constitution, irregular or intemperate habits, and what ?

Ans. 2. No.

Ques. 3. Has there been any insanity, appoplexy, consumption, or other hereditary disease in the party's family, (in his grand parents, or any of their de'cendants) ? If so, state the particulars.

Ans. 3. No.

Ques. 4. Has the party had local or general paralysis, appoplexy, epilepsy, or other disease having its seat in the brain or nervous system, or any predisposition thereto ? If so, state the particulars.

Ans. 4. No.

Ques. 5. Has the party ever spit blood, or been subject to cough, profuse expectoration, difficulty in breathing, or other disease of the lungs ? If so, state the particulars.

43 Ans. No.

Ques. 6. Are the lungs in a perfectly healthy condition ; is the respiration full, gentle, and regular ; does percussion give a normal resonance ?

Ans. Yes. Yes. Yes.

Ques. 7. Has the party ever suffered from palpitations, fluttering, pains, or other inconvenience in the region of the heart ? If so, state particularly.

Ans. 7. No.

Ques. 8. Rate and general character of the pulse; are the r'ythm and impulse of the heart healthy ?

Ans. 6. 70, normal. Yes.

Ques. 9. Has the party had any disease of the liver or kidneys, dyspepsia, colic, disentery, hernia, strangury, or other disease of the abdominal viscera ? If so, state particulars.

Ans. 9. No.

Ques. 10. Has the party had scrofula, rheumatism, gout, dropsy, or other diseases not enumerated, or any results of mechanical injury ? If so, state particulars.

Ans. 10. None.

44 Ques. 11. Do you think the party will survive the term of expectation ? (Read explanation, and refer to the table in margin.)

Ans. 11. Yes.

Ques. 12. Do you consider the risk a good one ; if not, state particulars ?

Ans. 12. Life healthy, and risk advised.

Dated Keokuk, this 23rd day of May, 1867.

Examination made and signed by M. F. Collins, medical examin*ation*.

If the spaces above are insufficient, please write fully to the company your opinion in a supplementary note.

The within risk recommended by

A. B. BALL, *Agent.*

Please date the certificate the day the personal examination is actually made.

Table showing the expectation of life at every age, according to the observation made by Carlysle.

Age.	Expect.	Age.	Expect.	Age.	Expect.	Age.	Expect.
10	48.82	14	45.75	18	42.87	22	39.31
11	48.04	15	45.00	19	42.17	23	38.59
12	47.27	16	44.27	20	41.46	24	37.86
13	46 01	17	43.57	21	40.75	25	38.00

45

Age.	Expect.	Age.	Expect.	Age.	Expect.	Age.	Expect.
26	37.14	37	28.95	48	21.81	59	14.34
27	36.41	38	28.28	49	21.11	60	13.82
28	35.69	39	27.61	50	20.39	61	13.31
29	35 00	40	26.97	51	19.68	62	12.81
30	34 34	41	26.34	52	18.97	63	12.30
31	33.68	42	25.71	53	18.28	64	11.79
32	33.03	43	25.09	54	17.58	65	11.27
33	32.36	44	24.46	55	16.89	66	10.75
34	31.68	45	23.82	56	16.21	67	10.23
35	30.32	46	23.17	57	15.53	68	9.70
36	29.64	47	22.50	58	14.92	69	

(Endorsed:) Filed May 3rd, 1871. George B. Corkhill, clerk.

46 And afterwards, to wit, on the 13th day of March, 1871, there was filed in the office of the clerk of said court a petition to transfer to United States circuit court, in words and figures following, to wit:

STATE OF IOWA,
Circuit Court of Lee County:

47 HENRY WILKINSON
vs.
UNION MUTUAL LIFE INSURANCE CO., OF Maine.

To the honorable the justices of the circuit court of Lee County, Iowa, at Keokuk:

Comes the Union Mutual Life Insurance Company, the defendant in the above action, and respectfully represents that the plaintiff, in the above action, is a citizen of the State of Iowa, and that defendant's corporation is a citizen of the State of Maine and incorporated by said State of Main'; that the sum in dispute in said action exceeds the sum of five hundred dollars, exclusive of costs and that your petitioner does believe and has reason to believe that from pre'judice and from local influence, the defendant's company will not be able to obtain justice in the above-named State court, where said action is now pending. And, therefore before any final trial of the above-entitled action in said court

48 the said Union Mutual Life Insurance Company comes and prays that the above action may be removed from the said circuit court for Lee County into the next circuit court of the United States to be held in the District of Iowa, in which the suit is now pending. In support whereof the said defendant submits the following affidavits made in its behalf, by Daniel Sharp, and has caused its corporate seal to be hereto annexed.

(Signed) UNION MUTUAL LIFE INSURANCE COMPANY,
[SEAL.] By DANIEL SHARP,
Vice-President of said Co.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk County, ss:

Daniel Sharp, of Boston, in said county of Suffolk, as he is vice-president of the Union Mutual Life Insurance Company and in behalf of said company on oath says that said Union Mutual Life Insurance Company
49 is a corporation, incorporated by the laws of the State of Maine, and that said corporation is a citizen of the State of Maine; that a suit is now pending in a State court, namely, in the circuit court for Lee County, Iowa, at Keokuk, wherein Henry Wilkinson, of Keokuk, in the county of Lee, and in the State of Iowa, and who is a citizen of said State of Iowa, is the plaintiff, and that the said Union Mutual Life Insurance Company is the defendant, and in which there is a controversy between a citizen of the State in which the said suit is brought and a citizen of another State; that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs; and that this affiant has reason to believe that from prejudice and from local influence the said Union Mutual Life Insurance Company will not be able to obtain justice in said circuit court for Lee County, Iowa, at Keokuk, where said suit is pending.

DANIEL SHARP.

50 With which said motion there was filed an affidavit in word and figures as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk County, ss:

BOSTON, *June 10th*, 1870.

Then personally came before me, Joseph Cutler, a justice of the peace for said county, Daniel Sharp, above-named and made oath that the statements contained in the foregoing affidavit by him subscribed were true.

JOSEPH CUTLER,
Justice of Peace.

And also filed with said petition a bond in words and figures as follows, to wit:

Bond.

Know all men by these presents we, The Union Mutual Life Insurance *that* Company, a corporation duly incorporated by the laws of the State of Maine, as principal, and R. James Anderson in the county of Lee, in the State of Iowa, as surety, are holden and stand firmly
51 bound and obliged unto Henry Wilkinson, of Keokuk, in the county of Lee and State of Iowa, in the full and just sum of two hundred dollars, to be paid unto the said Henry Wilkinson, and to his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, heirs, executors, and administrators and successors, firmly by these presents, sealed with our seals the 13th day of March, in the year of our Lord one thousand eight hundred and seventy-one.

The condition of this obligation is such, that whereas there is now pending in the circuit court for Lee County, Iowa, at Keokuk, in the State of Iowa, an action or process at law, wherein the said Henry Wilkinson is plaintiff and the said corporation is defendant, and wherein the said Wilkinson seek' to recover of said corporation the sum of

$2,000 00 and interest upon a policy of insurance upon the life of
52 Melinda J. Wilkinson; and whereas the said corporation has petitioned the above-named circuit court for Lee County for the removal of said action or process into the next circuit court of the United States, to be held in the district of said State of Iowa, where said action is now pending:

Now, therefore, if the said corporation shall cause to be filed and entered in the next circuit court of the United States, to be held in and for the district of Iowa, on the first day of its session, copies of all process in said suit, and of all pleadings, depositions, testimony, and of all other proceedings in said suit, and shall do such other acts as are required by the acts of Congress of the United States, approved March 2d, 1867, and July 27, 1866, upon removal of suits from State courts to the United States court, then this obligation to be void; otherwise to remain in full force.

(Signed) UNION MUTUAL LIFE INSURANCE COMPANY,
By DAN'L SHARP, *Vice Pres.* [SEAL.]
R. JAMES ANDERSON. [SEAL.]

Executed in presence of—
[SEAL.] C. P. JUDD, to cor. secretary.

53 And afterwards, to wit, on the 13th day of March, 1871, plaintiff filed in the office of the clerk of said court exceptions to the allowance of said petition in words and figures as follows, to wit:

HENRY WILKINSON
vs.
UNION MUTUAL LIFE INSURANCE COMPANY.

Defendants object to the removal of this cause to the circuit court of the United States, because—

1. There is no sufficient evidence or proof in defendant's application for removal or transfer that the same has been or is supported by affidavit of its truth as required by the act of Congress. This court cannot, ex-officio, take notice that somebody who signs himself Jos. Cutter, is a justice of the peace of Massachusetts; and plaintiff having no knowledge of said Cutter, denies his authority to administer oaths.

54 2. Defendant has appeared and filed its answer and pleas in this court, and, with permission of the court, amended its answer; and defendant has voluntarily submitted to the jurisdiction of this court by the several acts aforesaid; and this court did, by such acts of defendant, with its consent, obtain full jurisdiction of the case; and having obtained jurisdiction of the case and of defendant as well as plaintiff, defendant has not the right now to *resist* the jurisdiction of this court, and move the cause to a United States court. The several pleadings of defendant and record entrys of this case are referred to and made a part of plaintiff's opposition to defendant's petition.

W. J. COCHRANE,
J. H. CRAIG,
McCRARY, MILLER & McCRARY,
Attorneys for Plaintiff.

And afterwards, to wit, on the 14th day of March, 1871, defendants filed in the office of said clerk, another affidavit, in words and figures, to wit:

55 STATE OF IOWA, *Lee County, ss:*

I, James H. Anderson, being first duly sworn, on my oath say that I am attorney for the defendant in this suit, The Union Mutual Life Insurance Company of Maine; that the plaintiff in this suit is a citizen of the State of Iowa; that defendant is a citizen of the State of Maine, and is a corporation existing under the laws of the State of Maine; that the sum in controversy exceeds the sum of five hundred dollars; that there is reason to believe, and I, as attorney for defendant, do believe, that from prejudice and local influence, the said defendant will not be able to obtain justice in the State court, in which said suit is brought; that the facts above stated are true, as I verily believe.

JAMES H. ANDERSON.

Subscribed and sworn to by said James H. Anderson in my
56 presence, on this 14th day of March, A. D. 1871.

J. ADAIR McDOWELL, *Clerk, C. C.*
By C. L. ALLEN, *Deputy.*

And afterwards, to wit, on the 4th day of March, 1871, at eleven and a half o'clock of said day, their was filed the following paper:

HENRY WILKINSON
vs.
UNION MUTUAL LIFE INSURANCE COMPANY. } Ordinary.

Now comes plaintiff, and for answer to the affidavit in this case, filed since the arguments and defendant's application for a removal of this cause to the circuit court of the United States filed yesterday, plaintiff answering, says that the clause of the Constitution of the United States which extends the judicial power of the courts of the United States (article 3, section 2) to suits or controversis between citizens of different States does not make that jurisdiction exclusive, but simply en-
57 dows a citizen sued in a State of which he is not a citizen with the right to object to the jurisdiction of the State court as to him, and if, instead of objecting to the jurisdiction of a State court in which he is sued and claiming his right to have the case removed to a court of the United states, he voluntarily enters his appearance in the State court, and answers and does other acts in said State court, acknowledging its jurisdiction and power over him, he is afterwards estopped from the right to remove his case from the State court jurisdiction, nor can Congress constitutionally pass a law to *resist* jurisdiction from a State court, where it has concurrent jurisdiction of the matter and parties before it with courts of the United States, and has legal jurisdiction of the subject-matter of the suit, and of all the parties to the suit.

And plaintiff shows that, in this case, defendant voluntarily
58 appeared in this court, and has answered and defended according to the rules and usual practices of this court, and, therefor', defendant has no right, under the Constitution of the United States, to have this cause removed beyond the jurisdiction of this court, and plaintiff makes all the record entries and pleadings in this case a part of plaintiff's opposition to said affidavit, and to show the jurisdiction of this court; and plaintiff further objects to the affidavit of said Anderson, because it is not in due form of law, and the act of Congress, under which the said application for removal is made, does not authorize said Anderson, as attorney, to make said affidavit.

W'M J. COCHRANE, JOHN H. CRAIG,
McCRARY, MILLER & McCRARY,
Attorneys for Plaintiff.

59 And be it further remembered that in the said cause, at the times and dates hereinafter set out, there was the following entries made in the records of the said court.

At the February term, 1870, on Monday, February 28th, on the first day of the term, is the following entry:

HENRY WILKINSON
vs.
UNION MUTUAL LIFE INSURANCE COMPANY OF Maine. } Money.

This cause is continued gene'ally—Miller, W. J. Cochrane & Son, attorneys for plaintiff; Gillman & Anderson, attorneys for defendants.

At the February term, 1871, and on the 4th day of the term, March 16th, 1871, the following entry was made in words and figures, to wit:

60 *Motion.*

HENRY WILKINSON
vs.
UNION MUTUAL LIFE INSURANCE COMPANY.

This day came defendant, by Gillman & Anderson, and plaintiff, McCrary, Miller & McCrary, & W. J. Cochrane, its attorneys, and the cause coming on to be heard on the motion and affidavit of defendant to transfer this cause to the circuit court of the United States, and the court, after hearing the arguments of counsel, sustains the motion.

And afterwards, on the 20th day of March, 1871, being the eight' day of the term, the following entry was made in words and figures, to wit:

HENRY WILKINSON
vs.
UNION MUTUAL LIFE INSURANCE COMPANY OF Maine.

61 This day come plaintiff, by John H. Craig, McCrary, Miller, and McCrary, and W. J. Cochrane, his attorneys, and defendant, by Gillmore & Anderson, its attorneys, and the cause coming on to be heard upon the motion by defendant to remove this cause for trial to the circuit court of the United States in and for the district of Iowa, and the court being fully advised in the premises, sustains the motion:

It is therefore ordered and adjudged that the cause be removed to the circuit court of the United States in and for the district of Iowa, upon filing a bond, to be approved by the clerk, in the sum of two hundred dollars, conditioned that defendant will file in the circuit court of the United States for the district of Iowa, on the first day of its next session; to which ruling plaintiff at the time excepted. It is fnrther ordered at the same time that defendant pay the costs of this
62 term of court to the date of the filing of the affidavit of J. H. Anderson, for removal of this cause to circuit court of United States.

It is therefore ordered and adjudged that plaintiff have and recover

of defendant the costs of this term of court to the date of the filing of said affidavit, taxed at $, and that execution issue therefore; to which defendant at the time, by its attorneys, excepted.

STATE OF IOWA, *Lee County, ss:*

I, John Adair McDowell, clerk of the said circuit court of Lee County, Iowa, do hereby certify that the foregoing is a full and complete copy of the pleadings and record entries in said above-entitled cause, as shown by the records in my office.

Witness my name and seal of said court this 20th day of April, A. D. 1871.

[SEAL.] JOHN ADAIR McDOWELL, *C. C.*,
By C. L. ALLEN, *Deputy.*

Fees for making transcript, $8 70, paid by Gillmore & Anderson.

63 On the 17th day of May, A. D. 1871, came the parties, by their att'ys, and filed in said cause the following stipulation:

Circuit court United States, Des Moines, Iowa.

HENRY WILKINSON
vs.
THE UNION MUTUAL LIFE INSURANCE CO. OF Maine. } 1089. Ordinary.

It is agreed by and between the parties in the above-entitled cause that it shall not be taken up for trial before Tuesday, the 30th day of May inst., without consent of the said parties, and not then except by consent of both parties.

W. J. COCHRANE ET AL.,
Attorneys for Plaintiff.
GILLMORE & ANDERSON,
Attorneys for Defendant.

Des Moines, Iowa, May 17th, 1871.

(Endorsed:) Filed May 17th, 1871. George B. Corkhill, clerk.

64 And on this day, to wit, on the 17th day of May, in the May term, A. D. 1871, of said court, in the records of the proceedings thereof, in said entitled cause, appears the following entry, to wit:

HENRY WILKINSON
vs.
THE UNION MUTUAL LIFE INSURANCE CO. OF MAINE. } No. 1089. Law.

This day this cause coming on for a hearing, the plaintiff appearing by D. F. Miller & Cochrane & Sons, the same is passed until the 30th day of May, as per stipulation of parties on file.

And on this day, to wit, the 30th day of May, in the May term, A. D. 1871, of said court, in the records of the proceedings thereof in said entitled cause appears the following entry, to wit:

HENRY WILKINSON
vs.
THE UNION MUTUAL LIFE INS. CO. OF MAINE. } No. 1089. Law.

This cause coming on for a hearing, the same was continued.

65 And on this day, to wit, the 31st day of October, in the October term, A. D. 1871, of said court, in the records of the proceedings thereof in said entitled cause appears the following entry, to wit:

HENRY WILKINSON
vs.
THE UNION MUTUAL LIFE INSURANCE CO. OF Maine. } No. 1089. Law.

This day this cause coming on to be heard, plaintiff appears by Cochran, Craig & McCrary, and defendant by Gillmore & Anderson; and then came a jury of twelve good and lawful men, to wit, E. B. Foster, Jno. W. Scott, S. B. Keffer, Thomas Griffith, W'm Graham, Geo. H. Mason, H. Wilkinson, Geo. D. McCain, R. L. Tidrick, A. Barton, W'm Bitting, and W. H. Corkhill, who were duly empannelled, and sworn to well and truly try this cause and the issues joined, and a true verdict render according to the law and the evidence given in court; and, after hearing statement of case from counsel and part of the evidence, they were discharged until 9 o'clock to-morrow morning.

66 And on this day, to wit, the 1st day of November, in the said October term, A. D. 1871, of said court, in the records of the proceedings thereof in said entitled cause, appears the following entry, to wit:

HENRY WILKINSON
vs.
THE UNION MUTUAL LIFE INSURANCE CO. } No. 1089. Law.

This day this cause coming on for further hearing, the parties appear by their attorneys, and the jury came the same as yesterday, and, they having heard all the evidence, argument of counsel, and charge of court, they retired to a private room, under charge of a sworn bailiff, to consider their verdict.

67 And on this day, to wit, the 2nd day of November, in the said October term, A. D. 1871, of said court, in the records of the proceedings thereof in said entitled cause, appears the following entry, to wit:

HENRY WILKINSON
vs.
THE UNION MUTUAL LIFE INSURANCE CO. of Maine. } No. 1089. Law.

This cause having been submitted to the jury on yesterday, they return into open court the following verdict, to wit: "We, the jurors, find for the plaintiff, and assess his damages at two thousand three hundred and four & $\frac{33}{100}$ ($2,304 33) dollars. W. H. Corkhill, foreman." In addition to the general verdict in this case the jury were required

under the statute adopted in this court specially to find as to the following facts:

"I. Did Melinda Jane Wilkinson, in the year 1862, receive a serious personal injury by falling from a tree?

"Answer. Yes; injured, not seriously.

68 "III. Were the effects of such fall temporary, and had these effects wholly passed away, without influencing or affecting her subsequent health or length of life prior to the time when the application for insurance in this case was taken?

"Answer. Yes.

"II. Did Melinda Jane Wilkinson have consumption or lung disease prior to May, 1867?

"Answer. No.

"As to the age of *of* the mother of the said Melinda, and the cause of her death, the jury find the facts to be as follows:

"The agent of the company, in taking and filling up the application, asked these questions of the applicant; that she answered in substance that she did not know, and could not answer these questions as her mother had died when she was a child, and she made no statement to the agent in these respects; that a woman by the name of Ann Wilson then present, who *who* had been a slave with the mother, in the same family, gave the agent certain information in these respects; that

69 the information was relied on by the agent, and from this information he concluded that the mother of the applicant had died at the age of about 40 years, and that the disease of which she died was fever or child-fever, and the agent accordingly wrote down the answers in the application, which now appear therein, and we find that he did this upon his own judgment, upon information thus acquired, without their truth being affirmed or assented to by the applicant or plaintiff. And we also find that the applicant did not know, when she signed the application, how the answers were written down by the agent. We also find that the mother of said Melinda died when about 23 years of age. We also find that the mother of the said Melinda did not die of consumption.

"W. H. CORKHILL,
"*Foreman.*"

Thereupon the defendant gives notice of motion in arrest of judgment and for new trial.

70 And on the 2nd day of November, A. D. 1871, came the said defendant by its attorneys, and filed in said cause its motion for a new trial, which is in words and figures, following:

Motion.

U. S. circuit court for dist. of Iowa.

HENRY WILKINSON
vs.
UNION MUTUAL LIFE INSURANCE CO. OF Maine.

And now comes defendant in the above cause, and moves the court, that the verdict in said cause be set aside, and for a new trial in said cause, and for cause thereof shows—

1. That the said verdict was contrary to law.

2. That the said verdict was not sustained by sufficient evidence.
3. Because of erroneous rulings made by the court during the trial and excepted to by defendant at the time.

GILLMORE & ANDERSON,
Attorneys for Defendant.

(Endorsed:) Filed Nov. 2nd, 1871. George B. Corkhill, clerk.

71 And on this day, to wit, the 4th day of November, in the said October term, A. D. 1871, of said court in the records of the proceedings thereof in said entitled cause appears the following entry to wit:

HENRY WILKINSON,
vs.
THE UNION MUTUAL LIFE INSURANCE CO., OF Maine. } No. 1089.

This cause coming on this day for hearing upon motion of defendant for a new trial herein, the plaintiff appears by Cochran, McCrary, & Craig, and defendant by Gillmore & Anderson; and the court having heard the argument of counsel and being fully advised, overrules said motion and orders judgment upon the verdict; it is therefore considered and adjudged that the plaintiff have and recover of and from the defendant the sum of two thousand three hundred and four & $\frac{33}{100}$ dollars, with interest at six per cent. from the 2nd day of November, 1871, until paid and the costs herein taxed at $, and that execution issue therefor.

72 On the hearing of said cause the following exceptions were taken and allowed by the court and made of record herein and are in words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States for the district of Iowa.

HENRY WILKINSON
vs.
THE UNION MUTUAL LIFE INSURANCE COMpany of Maine.

Be it remembered that, on this day, the above-entitled cause came on to be tried in said court before a jury of twelve good and lawful men whose names are as follows: E. B. Foster, Jno. W. Scott, S. B. Keffer, Tho's Griffith, William Graham, George H. Mason, H. Wilkinson, George D. McCain, R. L. Tidrick, A. Barton, W'm Bitting, W. H. Corkhill, upon the pleadings and issues in said cause, (the statute treating the answer as denied or avoided) as shown by the record (which
73 is hereto attached and marked Exhibit No. 1, and made a part of this bill,) and the said defendant having admitted the execution of the policy of insurance sued on numbered 21707, a true copy of which is attached to the petition in said cause; and having also admitted the death of Malinda J. Wilkinson and due proof of loss; and having also admitted the payment of premiums and annual dues as provided by the policy; and having undertaken the burden of proof of the issues as made

by its said answer; and having introduced in evidence the application or statement signed by Melinda J. Wilkinson and Henry Wilkinson, and proof of the execution of same, a copy of which is attached to the answer in said cause and admitted to be the statement or application on which said policy was issued; and the said defendant having then introduced testimony tending to show that one Sarah was the mother of said
73½ Malinda J. Wilkinson; and also evidence tending to show that the said Sarah died at the age of twenty-three (23) years; and also evidence tending to show that she died at said age of consumption or disease of the lungs; and said defendant having also introduced evidence tending to show that the said Melinda J. Wilkinson, in the year A. D. 1862, fell from the top of a tree to the ground a distance of about forty (40) feet; that she was taken up insensible, and remained sick and confined to her bed for the period of several weeks thereafter, and also evidence tending to show that the said Melinda having been straight and symmetrical in her person, immediately thereafter became round-shouldered & sunken in the chest, and that she suffered from pains in the side and back; and having also introduced testimony tending to show that the said Melinda J. Wilkinson at the time of signing said application was afflicted with consumption or disease of the lungs.

74 The defendant thereupon rested his case; and thereupon the plaintiff having introduced other testimony tending to contradict the said testimony of defendant.

Mr. A. B. BALL, being called as a witness by the plaintiff, stated that, in 1867, he represented as agent, this company (the defendant) in Lee County, Iowa, in the city of Keokuk, and Handcock County, Illinois. That the company forwarded to him blank applications; that during that time he was the only agent of defendant, then in that territory, and and that during that period, he was under Mr. Babcock, general agent of defendant, who had an office in Davenport and did business in Chicago. That he was in the habit of filling up applications and when received of forwarding to the general agent, and when policies were returned of delivering them and acting for the company in the col-
75 lection of premiums, and delivering polic'es and making proofs of loss. That he had his office at Keokuk, and advertised himself as agent of the defendant. Witness was shown the application on which the policy in suit was issued.

Int. No. 1. I now hand you the application for insurance in this case; please look at it and state who made it out?

Ans. 1. I made it out.

Int. 2. Whose agent were you at the time of filling out this application?

Ans. 2. I suppose I was the agent of the company, acting through the general agent.

Int. 3. How many applications did you take prior to this time and after?

Ans. 3. I think between 200 and 300; I don't know how many were taken before this application.

Int. 4. Were your proceedings the same in all cases in taking applications?

Ans. 4. They were.

Int. 5. What proofs of death did you forward to the company?

Ans. 5. I forwarded three or four; my work was received and
76 approved, whenever I did work; I had two counties—Hancock County, Illinois, and Lee County, Iowa. I took applications

principally in Handcock and Lee Counties, and some in Des Moines County.

Int. 6. Who were present at the time the application in this case was taken down?

Ans. 6. Dr. Collins, the physician, was present all the time, and plaintiff part of the time; we were at Wilkinson's house; Anna Wilson was present.

Int. 7. It was asked in the application how old her (Mrs. W's) mother was at the time of her death, and the figure 40 is set opposite; who wrote the figure 40?

Ans. 7. I presume I did; don't doubt but that I did; no one else had anything to do with that part of the application but myself; I wrote it.

Int. 8. Now state how you came to put down the figure 40 at the time opposite that question—whether the question was asked of the applicant as to the age of her mother at her death, and all that was
77 said at the time in answer to that question?

(Objected to by defendant as incompetent and irrelevant. Objection overruled. Def't excepts.)

Ans. 8. When I came to that part of the application, I asked the question in regard to the parents; the reply was by the applicant, that she knew nothing in particular of her parents, any more than hearsay. Mr. Wilkinson spoke, and said he knew nothing of his wife's parents. Ann Anderson, now called Ann Wilson, was present, and had been there the whole time; she said she knew Mrs. Wilkinson's mother, and had known her for many years, and knew her at the time she died, and said that she was considerable older than she was herself. As near as I can recollect, she said that Mrs. Wilkinson's mother was older than she was; she herself was thirty seven years old. I spoke to the Doctor (Collins) in regard to his opinion, after obtaining the age of the child, who was some 19 past; we talked it over amongst ourselves—that is the Dr. and
I. This woman Wilson seemed to know considerable of them;
78 we put the age down at 40 years, believing it to be as near as we could ascertain. I think about that time Mrs. Wilkinson spoke and said we would have to use our own judgments about a good many things. This woman Wilson said repeatedly that she knew her mother, and she was satisfied that she was considerably older than she was herself.

Int. 9. (Witness is shown application.) Look at question No. 15, in relation to the disease with which her mother died; state whether that question was put by you to the applicant, and all that was said by the applicant and other persons present in relation to it, and how you obtained your answer which is written down?

(Objected to by defendant's attorney, as stating hearsay, and incompetent and immaterial; and objection overruled.)

Ans. 9. In regard to the means of her mother's death, the reply, as near as I can recollect, was that she didn't know only from hear-
79 say, as she was young—a mere child—when she died. This Ann Wilson said she knew her mother, and had seen her prior or before that time, and she was confined in time of high water, took cold from exposure too soon, had a fever, and died with a fever. I arrived at the cause of her death from Ann Wilson; she said she was healthy up to the time that she died. The cause of her death I believed to be from exposure and taking a sudden cold. That is what I gathered from Ann Wilson.

(Answer objected to by defendant as hearsay, incompetent, and irrelevant. Objection overruled. "Defendant excepts.")

Int. 10. Have you stated all that was said by the assured in relation to her mother's death?

(Objected to by defendant as incompetent. Objection overruled by the court, and defendant excepts.)

Ans. 10. Her statement was that she knew nothing about it, only from hearsay, as to the cause, and I gathered the information that I
80 did from Ann Wilson, then called Ann Anderson.

Int. 11. Did she state the reason why she had no information as to her mother, only from hearsay?

Ans. 11. Yes, sir; she told me she was young and knew nothing about her mother; that she was born a slave.

(To each and every one of said questions to and including the said question eleven, and from and including said question one, the said attorneys for defendant objected at the time the said questions and
81 each of them wer' asked, for the reason that the said questions and each of them were incompetent, immaterial, and irrelevant; but the said objections and each of them were overruled by the court, and the said questions were answered by the witness as hereinbefore shown; to which rulings of the court in severally overruling each of said objections, and permitting said questions to be answered, the said defendant, by its attorneys, excepted at the time each of said rulings was made.)

And thereupon, subject to all his aforesaid objections, and not waiving any of them, the said defendant cross-examined said witness as follows:

Cross-int. 1. Mr. Ball, as agent for the defendant, you didn't pass upon the sufficiency of the application for insurance at all, but sent the application to defendant for them to grant or reject the application; then, if they accepted, to send on the policy?

Ans. 1. That is the way it was done.

82 (It is here admitted that the defendant is a foreign corporation.)

And thereupon plaintiff, by his attorneys, called to the stand as a witness HENRY WILKINSON, the plaintiff, who, on examination-in-chief, testified as follows:

Int. 1. About the time that you took out insurance, Mr. Ball came to your house?

Ans. 1. Yes, sir.

Int. 2. Who were present at the time the application was taken?

Ans. 2. Dr. Collins, Ann Wilson, and Mr. Ball. I was'nt there all of the time. They were there when I was there.

Int. 3. Now, what do you know, if anything, about the answer in this application to the question: At what age did the mother of your wife die; what, if anything, was said between you and Mr. Ball, the agent of the defendant, on that subject, at the time the application was being taken?

(Objected to by the defendant. Objection overruled. Defendant excepts.)

Ans. 3. Mr. Ball asked what was the cause of it; my wife told
83 him that she was young when her mother died, and could'nt tell any more than hearsay; she said her mother died with a fever, or something that way; I believe they called it bed-fever; that, I think she said, was in 1851, during a high-water time, and came from having a baby; I disremember the words.

Int. 4. Go on; state all that was said at that time about your wife's mother.

Ans. 4. Mr. Ball asked me about it, and I told him it was useless as I had only got acquainted with them since I came from Kentucky, and he wanted to know about her father; (I guess there ain't any use of telling all that was said, is there?) I said I guessed that Mrs. Hill's father was her father. I believe I answered it in that way. There is no use asking any one about *there* parents who had been in slavery. Then Mr. Ball said he wanted to fill out the blank, and I just told him that we did'nt know anything about her parents, and to just write it down
84 so—that we did'nt know—and send the policy. He did'nt want to do that, as he wanted to have the blanks filled. They did'nt put the age there then, at all. I went away then after water. I was going around and I met Mr. Ball, and he asked me if he had'nt better send that application, and I said I did'nt know anything about that; I did'nt see him put it in.

Int. 5. Well, what did you say to him at the time you met him there?

Ans. 5. He wanted to put in her age at about 40 years old; the truth was we did'nt know anything about the age; we did'nt know anything about that, and told him so.

Int. 6. He said he would make it all right with the company?

Ans. 6. Yes; I told him to send it on, and when policy came, I would pay him for it.

Int. 7. Do you know the cause of your wife's miscarriage in Illinois?

Ans. 7. She was going to Warsaw in a wagon, after some fruit
85 cans; I believe the wagon had no lock on it, and going down a hill the horses tried to run, and some way she got scared, and jumped out of the wagon; she told me when we went there to Mrs. Rollins; she told me before she got home.

Int. 8. What cough, if any, had your wife before that miscarriage?

Ans. 8. I don't remember of any.

Int. 9. What did you know about her spitting blood before that miscarriage?

Ans. 9. I don't know of any.

Int. 10. What, if anything, do you know of any night sweats?

Ans. 10. That all happened after that miscarriage; didn't happen before.

(To which said questions, numbered 3, 4, 5, 6, defendant, by his attorneys, objected at the time each and every one of them was asked, for the reason that the said questions and each of them was incompetent, immaterial, and irrelevant; which said objections, and each of them were severally overruled by the court, and the said ques-
86 tions, and each of them, were answered as hereinbefore shown; to which said rulings of the court, and each of them, the said defendant excepted at the time.)

And thereupon the plaintiff having introduced as a witness in his behalf, M. F. COLLINS, the attorney for plaintiff propounded to him the following questions:

Ques. 13. Do you remember any conversation passing between you and Mr. Ball and Melinda in relation to the age of her mother at the time of her death? I refer*red* to any conversation which may have taken place at the time of such examination.

Ans. 13. Yes.

Ques. 14. What did Melinda say at said time as to the age of her mother at the time of her death?

Ans. 14. I believe she said she didn't know her age.

Ques. 15. There is filed with defendant's answer what purports to be a copy of the written application of said Melinda answering
87 questions propounded by defendant; among others is one of the mother of Melinda relative to her age at the time of her death; will you state, if you know, who it was that wrote down the said answer for Melinda to the said questions propounded?

Ans. 15. If my memory serves me, I think I wrote down that answer myself.

Ques. 16. Defendant in its answer represents that the age of the mother, as set forth in said application, was put at forty years; can you tell how it came that 40 years was the time fixed on as the age of the mother at the time of her death?

Ans. 16. Well, after a consultation Mr. Ball, Mrs. Anderson, Mrs. Wilkinson, and myself, from all circumstances, thought her to be about forty years old.

Ques. 17. Dr., please read ques. 15 and its answer.

Ans. 17. I have done so.

Ques. 18. Are you content with that answer as it stands, or not?

Ans. 18. I am not.

88 Ques. 19. How do you want your answer to be to said 15th question?

Ans. 19. I want it to be that I believe that Mr. Ball wrote the answers in that application.

(To each of which said questions the defendant objected at the time, for the reason that the same and each of them were incompetent and immaterial; but the court overruled said objections, and the said questions were answered as hereinbefore shown; to which several rulings of the court, as to each of said questions, defendant excepted at the time.)

And thereupon, after the argument of counsel, and the said cause having been submitted to the jury, the defendant, by its attorney, asked the court that the said jury, under the practice in this court, be required, in addition to its general verdict, to find also special verdicts and answers to the following questions:

1. Did Malinda Jane Wilkinson, in the year 1862, receive a serious personal injury by falling from a tree?

89 2. Did Malinda Jane Wilkinson have consumption or lung disease prior to May 1867.

And thereupon, the court of its own motion required the jury to find and answer specially the following questions:

3. Were the effects of such fall temporary, and had these effects wholly passed away, without influencing or affecting her subsequent health, or length of life, prior to the time when the application for insurance in this case was taken?

4. As to the age of the mother of the said Malinda, and the cause of her death, the jury (find or do not find) the facts to be as follows: The agent of the company in taking and fil'ing up the application asked the questions on these subjects, of the applicant; that she answered in substance, that she did not know, and could not answer these questions, as her mother had died when she was a child, and she made no
90 statement to the agent in these respects; that a woman by the name of Ann Wilson, then present, who had been a slave with her mother, in the same family, gave the agent certain information in these respects; that this information was relied on by the agent, and from this information he concluded that the mother of the applicant had died at the age of about 40 years, and that the disease of which she

died was fever, or child-fever; and the agent accordingly so wrote down the answers, in the application which now appear therein; and we find that he did this on his own judgment, upon information thus acquired, and without their truth being affirmed or assented to by the applicant or the plaintiff. And we also find that the applicant did not know, when she signed the application, how the answers were written down by the agent.

91 5. We also (find, or do not find) that the mother of the said Melinda, in fact, died when about 23 years of age.

6. We also (find, or do not find) that the mother of the said Melinda did not die of consumption.

(To the giving of which said questions 3 & 4, by the court, the defendant excepted at the time as immaterial, and irrelevant, and as improper to be considered by the jury in determining the true issues in said cause.)

And thereupon the court instructed the jury as follows:

GENTLEMEN OF THE JURY: 1. This is an action upon a life insurance policy, upon the life of the plaintiff's late wife, issued by the defendant, upon the 1st day of June, 1867. It is admitted on the trial that the plaintiff's wife thus insured, died on the 2nd day of January, 1869, and that proofs of loss have been duly made. The defendant admit-

92 ting that the plaintiff is prima facie entitled to recover, has assumed the burden of making out defense to this action (under the laws of this State, adopted in this court; the statute puts in a reply for the plaintiff, under which evidence in denial or avoidance of the defenses, set up in the answer is admissable.

2. To the defenses relied on your attenton will presently be directed. Insurance policies are contracts, and required to be construed and enforced, and according to the intention of the parties; the application and the policy are to be before the jury, and the contract between the parties embraces both instruments. The application declares that the statements therein contained, as to the past and present estate of health and habits of the person whose life is proposed to be insured, are true; and it is agreed between the parties that if there be any untrue

93 or fraudulent statement in the application which forms part of the policy, the policy shall be forfeited; and so in the policy there is a condition that if the statements in the application shall be found in any respect untrue, the policy shall be null and void. Such is the contract of the parties, and the law is that the specific questions asked of the applicant must be truly answered, and if answers in any respect untrue were given to such questions they would avoid the policy, although, relating to matters not materially affecting the risk and although they were not designedly untrue, or made with a view to deeeive or mislead the company.

3. The defendant relies upon the alleged falsity of certain answers in the application as defenses, and they are of two classes—to the first of which I shall refer in this instruction. The assured and the plaintiff had, it seems, prior to the war, been slaves; and the assured came to Keokuk, from Clark County, in Missouri. The company did

94 business in Keokuk (where the application was made and the policy delivered) through an agent by the name of Ball, to whom it furnished blank applications; and the mode of doing business appears to have been that the agent propounded the printed questions in the application, and took down the answers, and when the application was signed by the applicant, the friend and physician forwarded it to the

company, and if accepted, the policy was returned to this agent, who delivered it and collected and transmitted the premiums.

Among the questions in the application is this one: "Are the parents of the party dead?" and the answer as to the mother is that she was 40 years of age when she died, and that she died of fever.

The court has allowed the agent and others present when the application was taken to testify in regard to what was said by the agent and
95 by the applicant at the precise time the question was propounded and answered in respect thereto. Now, if you find from the evidence that when the agent, in taking and filling up the application, asked of the applicant the age of her mother at the time of her mother's death, she answered, and answered truly, that she did not know, except from hearsay, having been a slave and a mere child when her mother died; and thereupon the agent of the company inquired of an acquaintance or friend then present, of the applicant's mother, her age, when she died, and from what he learned, made up his mind that she died at the age of 40, and accordingly wrote this down in the application, and did this solely upon the strength of these inquiries and his own judgment, and not upon the representation of the applicant, I instruct you (if you find these to be the facts) that it is no defense to the
96 present action to show that the agent was mistaken, and that the mother of the applicant died at the age of 23 years; provided you find that the applicant did not know at what age her mother died, and did not state it, and declined to state it; and that the age was inserted by the agent upon the statements made to him by others in answer to inquiries he made of them, and upon the strength of his own judgment, based upon data thus ascertained.

It is stated in the application that the mother of Mrs. Wilkinson died of fever. It is contended by the company that this answer is false, and that in fact the mother died of consumption. This is denied by the plantiff; and the plaintift also maintains that when this question was propounded to the applicant, that she answered she did not know
97 and would not undertake to state, and that the agent thereupon, as in respect to her age, made inquiries of a woman present who knew the mother, and was present at her last illness, and from data thus ascertained, concluded that she had died of fever soon after childbirth, and accordingly wrote it down in the application as it now appears, and did this solely upon information thus procured, and not upon representations or answers given by the applicant or the plaintiff. If the evidence satisfies you, in point of fact, the mother died of consumption, this is a defense to this action, and you should find for the company, unless you also find from the evidence that the applicant and the plaintiff, when the question was propounded by the agent, answered and answered truly that they did not know, and could not and would not state, and that the agent thereupon undertook (in order to have the blank filled) to ascertain from a woman present who knew the
98 mother, of what she died, and concluding therefrom that she had died of fever, so wrote it down *it* the application, relying in so doing upon the data thus ascertained, and upon his own judgment, and not upon any statements & answers of the applicant or plaintiff.

4. Another defence relied on is this: In the application it is stated by the applicant, in answer to 11th question, that she is not now afflicted with any disease or disorder whatever; and it is also denied therein (answer to 8th question) that she has ever been afflicted with "habitual cough, disease of the lungs, consumption, or spitting of blood," &c. Now, it is claimed by the company, that these answers are untrue, and

that the applicant, Melinda, had a habitual cough or disease of the lungs; in fact, was laboring under consumption at the time; of which disease she subsequently (it is claimed) died. These claims are
99 denied by the plaintiff, and whether she was then afflicted with disease of the lungs, is a question of fact for you to decide from the evidence. If you find that she was then afflicted with a habitual cough, or with disease of the lungs, or with consumption then developed and existing, this is a defence to the policy. The application is a warranty that the applicant was not afflicted with any such disease; if the fact thus warranted is not true, the policy is void, and although there was no intentioned misstatement; but the burden of establishing the falsity of the facts thus warranted to be true, has been assumed by, and is upon the defendant.

5. Another defense relied on is the alleged falsity of the answer to the 9th question in the application. The question is, "Has the party ever had any serious illness, local disease, or personal injury? and the answer is "None."

100 Now, the defendant contends that the evidence shows that, in 1862, when she was about 14 years of age, she fell from a high tree, and received a serious personal injury. The plaintiff denies that the injury caused by the fall was serious, or that it permanently affected her health, or that any vestiges of it or its effects remained at the time the application was taken.

If the effects of this fall were temporary and had entirely passed away before the application was taken, and if it did not effect her health, or shorten her life, then the non-disclosure of the fall is no defence to this action. On the other hand, if the effects of the fall were not temporary, and remained when the application was taken, or if the fall affected the general health, or was so serious that it might effect the
101 health or shorten the life, then the non-disclosure of the injury caused by it, would defeat any right of recovery on the policy, although the failure to state the fact of the fall was not intentional or fraudulent.

(To which said instructions, numbered 2, 3, 4, & 5, the defendant excepted at the time.)

The jury returned the following general verdict:

"We, the jurors, find for the plaintiff, and assess his damages at two thousand three hundred and four & $\frac{33}{100}$ ($2,304 33) dollars.

"W'M H. CORKHILL, *Foreman.*"

And the following special findings and verdict:

I. Did Malinda Jane Wilkinson, in the year 1862, receive a serious personal injury by falling from a tree?

Answer. Yes; injured; not seriously.

II. Were the effects of such fall temporary, and had these effects wholly passed away without influenc'g or affecting her subsequent
102 health or length of life prior to the time when the application for insurance in this case was taken?

Answer. Yes.

III. Did Malinda Jane Wilkinson have consumption or lung disease prior to May, 1867?

Answer. No.

4. As to the age of the mother of the said Malinda, and the cause of her death, the jury find the facts to be as follows: The agent of the company, in taking and filling up the application, asked the questions

on these subjects of the applicant; that she answered in substance that she did not know, and could not answer these questions, as her mother had died when she was a child, and she made no statement to the agent in these respects; that a woman by the name of Ann Wilson, then present, who had been a slave with the mother in the same family
103 gave the agent certain information in these respects; that this information was relied on by the agent, and, from this information, he concluded that the mother of the applicant had died at the age of about 40 years, and that the disease of which she died was fever, or child-fever, and the agent accordingly so wrote down the answers in the application, which now appear therein, and we find that he did this on his own judgment, upon information thus acquired, and without their truth being affirmed or assented to by the applicant or the plaintiff.

5. And we also find that the applicant did not know when she signed the application how the answers were written down by the agent.

6. We also find the mother of the said Malinda in fact died when about 23 years of age.

We also find that the mother of the said Malinda did not die of consumption.

W. H. CORKHILL,
Foreman.

104 And as to all the foregoing orders, rulings, instructions, and actions of the court, as recited hereinbefore, and as to each of them severally, the defendant, by his attorneys, makes this his bill of exceptions as the true record thereof, praying that the same be signed by the court; which is accordingly done.

JNO. F. DILLON. [SEAL.]

105 And on this day, to wit, the 14th day of November, A. D. 1871, comes the said defendant, by its att'ys, and files in said clerk's office its supersedeas bond, which is in the following words & figures:

Know all men by these presents that we, The Union Mutual Life Insurance Company of Main', whose principal place of business it at Boston, Massachusetts, and Lyman C. Clark, of Chicago, Illinois, R. James Anderson, of Keokuk, Iowa, as surety, are held and firmly bound unto Henry Wilkinson, of Lee County, Iowa, in the penal sum of five thousand dollars; for the payment of which, well and truly to be made, in good and lawful money of the United States of America, we bind ourselves, our heirs, and legal representatives, sealed with our seals, and dated this 13th day of November, A. D. 1871.

The condition of the foregoing bond is such, that whereas the said Union Mutual Life Insurance Company of Main', being defendant
106 in a cause wherein said Henry Wilkinson was plaintiff, in which said cause a judgment was rendered in the circuit court of the United States for the district of Iowa, on the day of November, A. D. 1871, for the sum of two thousand dollars and costs; and whereas the said Union Mutual Life Insurance Company of Maine, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation, directed to the said Henry Wilkinson, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the Monday of December next:

Now, if the said Union Mutual Life Insurance Company of Maine shall prosecute said writ of error to effect, and answer all damages and

costs if the said company shall fail to make good their said plea, then the above obligation to be void; else to remain in full force and virtue.

107 Union Mutual Life Insurance Company of Maine.

(Signed) By LYMAN C. CLARK,
Attorney in Fact.

LYMAN C. CLARK.
R. JAMES ANDERSON.

STATE OF IOWA, *Lee County, ss:*

I, R. James Anderson, being duly sworn, on my oath, say that I am worth in money and property, over and above my just debts and liabilities, the amount of the above bond.

R. JAMES ANDERSON.

Subscribed and sworn to before me, and in my presence, by R. James Anderson, on this 13th day of November, A. D. 1871.

Witness my hand and seal notarial.

[NOTARIAL SEAL.] JAMES H. ANDERSON,
Notary Public.

108 To which is attached the following:

The Union Mutual Life Insurance Company, a corporation duly established by law, hereby authorize and empower Lyman C. Clark, of Chicago, Cook County, and State of Illinois, to execute in our name, and on our behalf, a bond to Henry Wilkinson, conditioned to prosecute an appeal from a judgment against this company, recovered Nov. 6, 1871, in a suit of said Wilkinson vs. this company, now pending in the circuit court of the United States for the district of Iowa, and to take such other steps as may be necessary to be done to complete an appeal from said judgment to the Supreme Court of the United States, under the direction of our attorneys Gillmore and Anderson, at Keokuk, Iowa.

In witness whereof the said corporation has hereto affixed its
109 corporate seal and name by its president, Henry Crocker, on this November 7th, A. D. 1871.

[SEAL.] UNION MUTUAL LIFE INS. CO.
By HENRY CROCKER, *Pres't.*

Executed in presence of—
C. P. JUDD.

(Endorsed:) Filed and approved Nov. 14th, A. D. 1871. George B. Corkhill, clerk.

110 The following is the original citation issued in said cause.

In the circuit court of the United States, district of Iowa, at law. To the Supreme Court of the United States.

HENRY WILKINSON
vs.
UNION MUTUAL LIFE INSURANCE COMPANY of Maine. } Writ of error.

The United States of America, greeting, to Henry Wilkinson:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States on the 3rd Monday of December next, pursuant to a writ of error filed in the clerk's office in the action above entitled, in which The Union Mutual Life Insurance Company of Maine is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John F. Dillon, judge of the said circuit court on this 14th day of November, A. D. (1871) one thousand eight hundred and seventy-one.

JNO. F. DILLON.

We accept service of the within citation this 20th day of November, 1871.

McCRARY, MILLER & McCRARY,
Of Counsel for Appellee.

(Indorsed:) Henry Wilkinson vs. Un. Mut. Life Ins. Co. Citation. Filed Nov. 14, 1871. George B. Corkhill, clerk.

111 The following is the original writ of error issued in said cause:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Iowa, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea, which is in said circuit court, before you, between Henry Wilkinson, plaintiff, and The Union Mutual Life Insurance Company of Maine, defendant, a manifest error hath happened to the great damage of the said defendant, as by his complaint appears: and we, being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on day next, in the Supreme Court, to be then and there held, that, the record and pro'eedings aforesaid being inspected, the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 14th day of November, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the United States, the ninety-sixth.

[SEAL.] GEORGE B. CORKHILL,
Clerk Circuit Court, U. S. Dist. of Iowa.

112 Circuit court of the United States, district of Iowa.

I, George B. Corkhill, clerk of said court for said district, do hereby certify that the above and foregoing transcript contains full, true, and complete copies of all pleadings, bill of exceptions, and record entries, and the original writ of error, and citation issued, in said cause,

in a certain cause wherein Henry Wilkinson was plaintiff, and The Union Mutual Life Insurance Company of Maine was defendant, as full, true, and complete as the originals of the same now remain on file and of record in my office and under my control.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at my office in Des Moines in said district, this 3rd day of January, A. D. 1872.

[SEAL.] GEORGE B. CORKHILL, *Clerk.*

(Indorsement on cover:) No. 589. The Union Mutual Life Insurance Co. of Maine, plaintiff in error, vs. Henry Wilkinson. Iowa C. C. U. S. Filed 13 January, 1872.

REC. 589—3

In the Supreme Court of the United States.

HENRY WILKINSON, *Appellee*,
vs.
THE UNION MUTUAL LIFE INSURANCE CO., OF MAINE, *Appellant*.

On error to the Circuit Court of the United States for the District of Iowa.

McCRARY, MILLER & McCRARY, JOHN H. CRAIG, and W. J. COCHRAN, — *Attorneys for Plaintiff and Appellee.*

GILLMORE & ANDERSON, and GEORGE G. WRIGHT. — *Attorneys for Defendant and Appellant.*

ARGUMENT OF ATTORNEYS FOR DEFENDANT AND APPELLANT.

The errors complained of, all appear in the Bill of Exceptions; viz:

1. The over-ruling by the Court of defendant's objections to questions propounded to the witness Ball, viz: questions number 8, 9, 10 and 11.

2. The over-ruling by the Court of defendant's objections to questions propounded to the witness Henry Wilkinson, (pl'ff,) viz: questions number 3, 4, 5 and 6.

3. The over-ruling by the Court of objections to questions propounded to the witness Collins, viz: questions numbered 13, 14, 15, 16, 17, 18 and 19.

4. It is also assigned as error on the part of the Court, requiring the jury to answer questions 3, and 4, propounded to them by the Court for a special verdict.

5. It is also assigned for error that the Court gave each of the instructions numbered 2, 3, 4 and 5.

This was a case in which the defendant, a Life Insurance Company, was a non-resident of the State of Iowa, having its principal office in Boston, Mass., and having an agent at Keokuk, in Iowa, whose duty it was to take applications, from persons desiring life insurance, and forward them to the company, which either rejected the application, or accepted it, issued a policy and sent it to the agent, who delivered the same, and received, for the company, the proper premium.

Henry Wilkinson, desiring a policy on the life of his wife, Malinda, signed, (the wife also signing) the Application.

This application was forwarded to the company, and thereupon the policy was issued on which this suit was afterwards brought.

This application declares that "the statements therein contained as to the past and present state of health and habits of "the person whose life is proposed to be insured, are true and it "is agreed between the parties that if there be any untrue or "fraudulent statement in the application, *which forms part of* "*the policy*, the policy shall be forfeited."

In the policy, it is provided "that if the statements in the ap-"plication *shall be found in any respect untrue*, the policy "shall be null and void."

By reference to the application, it will be seen that Henry and Malinda Wilkinson answer "no" to the 9th question, which reads as follows: "Has the party ever had any serious illness, local "disease, or personal injury? If so, of what nature and at what "age?"

The 15th question in the application, inquires whether the "parents of the party are dead, at what age did they die and "what was the cause of death?"

In answering this as to the mother of Malinda, they say that "she died at the age of 40," that the cause of her death was "fever; health good till a short time before her death."

In its answer to the petition, defendant denies that plaintiff is entitled to recover, claiming that the foregoing answers (as well as others) were untrue.

The testimony of the witnesses Ball, Wilkinson and Collins, (noticed in the 1st, 2nd and 3d causes of error assigned,) all tended to show by what means and sources of knowledge, the 15th question in the application, was answered. That is, notwithstanding Henry and Malinda had signed their names to these answers, the above named witnesses were allowed to testify, that at the time the application was filled up, both Henry and Malinda stated, that they did not know at what age Malinda's mother had died nor the cause of her death; that thereupon a conversation occurred between the persons present, some of whom had known the mother, and such information was supposed to be elicited as to induce the agent (Ball) to fill in the answers as stated, and then the application was signed by Henry and Malinda.

The 3d instruction touches the same matters. In it the court says: "the court has allowed the agent, and others present when "the application was taken, to testify in regard to what was said "by the agent and applicant, at the precise time the question was "propounded and answered in respect thereto. Now if you find from "the evidence, that when the agent in taking and filling up the ap- "plication, asked the applicant the age of her mother, at the time of "her mother's death, she answered, and answered truly, that she "did not know, except from hearsay, having been a slave, and a "mere child when her mother died, and thereupon the agent of the "company, enquired of an acquaintance or friend, then present, "of the applicant's mother, her age when she died and from what "he learned, made up his mind that she died at the age of 40, "and accordingly wrote this down in the application, and did this "solely upon the strength of these inquiries and his own judg- "ment, and not upon the representations of the applicant, I in- "struct you (if you find these to be the facts,) that it is no defense "to the present action, to show that the agent was mistaken and "and that the mother of the applicant died at the age of 23 years; "provided you find that the applicant did not know at what age "her mother died and did not state it and declined to state it and "that the age was inserted upon the statements made to him by "others, in answer to enquiries he made of them, and upon the "strength of his own judgment, based upon data thus ascer- "tained."

The same points of law are also involved in the 4th cause of error assigned, in that the court required the jury to answer the 4th question propounded for their special verdict.

These errors may, therefore, be considered in a group.

The question to be discussed is, had the court and jury, under any pretense whatever, any right to take into evidence the parol statements made by the applicant, or others, which were contemporaneous with the signing of the applicatiou.

Let it be observed, that by the terms of both instruments, the application was a part of the policy.

Both instruments taken together, constituted one contract.

The plaintiff sues on that contract, as it stands.

It had not been reformed in equity; but stood, on the day of trial, just as the respective parties had signed it.

We have, then, this anomalous position in a court of law, the plaintiff sues on a *written* contract, signed by himself as one of the parties; he asks a recovery according to the terms of that contract, and yet, in the same breath, is permitted by the court to contradict and vary the terms of this written contract, by proving what was stated by himself and others at and before the signing of the same!

This is no exaggeration, but is precisely the case made by the record.

A very fair and impartial bill of exceptions, places this naked question before the highest court in the country.

It is submitted, that the question as an abstract question, applied to contracts in general, does not admit of a moment's discussion.

Even a defendant, would not be permitted to contradict or vary, by parol, the terms of a written instrument; much less a plaintiff who seeks a recovery under that very instrument.

There should be no exception to the rule, nor is there any such unless it be in insurance contracts.

No reason exists, in the nature of things why any distinction should be made in this class of contracts ; nor has any court attempted to assign any such distinction.

The cases cited in the court below, and the case at bar, show, however, that this distinction has been made.

The cases thus far, are very few in number. The doctrine has been announced as a new revelation.

It will be necessary for courts to be candid; to say, we confine this doctrine to insurance cases exclusively, or else the oldest and best established rule of evidence, no longer has force or meaning.

The "new departure." is believed to have had its origin in the case of *Plumb* vs. *The Cattaraugus Co. Mut. Insurance Company*, 18 N. Y. 392. This was one of the cases relied on in the court below.

In that case, the plaintiff was the assignee of one Henry. Ide, the insurance agent filled out the application, brought it to Henry, told him it was all right and just as it should be, Henry looked it over, hastily, and without any particular examination as to the statement as to the distance and relative situation of other buildings, signed it, telling Ide that he did so upon his representations.

Whether the application was, by its terms, made a part of the policy, in that case, we are not informed.

The case also differs from the case at bar, in this, that Ide,

was considered a general, and not a mere special agent, as was Ball in this case.

In his opinion, in that case, Judge Pratt says: "I do not see "why the case is not the same in principle, as if the same thing "had been done by the company itself. Suppose an individual "insurer had himself assumed to make the survey and measur- "ments, and, as in this case, had filled up a blank application "and had represented to the applicants that his survey and meas- "urements were correct, and upon the faith of such representa- "tions, and with no knowledge of the facts themselves, the in- "sured had signed the application and thus made the statements "their own. Although they had thus been led into a warranty "of what was not true, they could not, undoubtedly, change "the contract by parol testimony. The writing must be still held "to express the contract between the parties. And neither party "can insist that the contract was other than what the writing "expresses."

Judge Pratt continues: "But when a party through whose "acts and representations, the other party was induced to enter "into the contract, claims a right to show that the facts were "different from what he had represented them to be, for the pur- "pose of showing a breach of the warranty, and thus avoiding "what would otherwise be a binding contract, and escaping its "obligations. I cannot discover why the doctrine of estoppel "may not justly be applied to him, and he be precluded from de- "nying what he once asserted. It presents, I think, the precise "case for the application of the doctrine of *estoppel in pais* "as defined in the cases."

This case seems to have had in it, an element of fraud or

mistake. On this account, the application, (if it was a part of the contract, which we do not know,) might have been reformed in equity; or, possibly, the practice of some courts, might have allowed equivalent treatment at law. But neither fraud nor mistake were charged. The decision is placed purely on the ground of estoppel.

Unless fraud or mistake was averred, the application, when signed by Henry, became his own act; he adopted that as his statement. It would be conclusive against him; an estoppel of everything cotemporaneous said or done by him; conclusive in two particulars, 1st, as to its recitals; 2nd, as to its being his own act; and not the act of some one else.

The court violated a cardinal rule of evidence, when, under the case as it stood, it permitted the plaintiff, to go behind the written contract and show what was done by himself and Ide.

The doctrine of estoppel, could never have got its nose into the case, had not this fundamental rule of evidence first been violated.

Judge Pratt himself inferentially admits the position for which we contend, when he says further on: "surely the *equities* "*of a cause*, never called more persuasively for the application "of the rule than they did in this case."

Doubtless, a correct result was arrived at in the determination oft he case, but it was arrived at, in the wrong forum, and for the wrong reasons.

Critically considered, the case does not deserve to become a precedent for anything.

As a case of general agency, certainly it is no precedent in a cause where it was the duty of the agent to take applications and forward them to the company, which issued or refused to issue their policy on inspection of the application alone.

In such a case, it is the true rule to hold that such an agent, in the matter of filling up the statement, becomes the agent of the applicant.

No rule is better settled, than that those dealing with an agent are bound to know the nature and extent of his authority.

The case of *Rowley* vs. *The Empire Insurance Company* 36 N. Y. 550, was also relied on in the court below.

The opinion in that case recites the foregoing case in 18 N. Y., 392, and admits "that that case has changed the rule which "has hitherto prevailed in New York, relating to warranties in "policies of insurance."

The new case, goes beyond the precedent on which it relies, and establishes still another doctrine, new to the courts, in conflict with all prior holdings.

The court says: "the written appointment of the agent, Dean, "shows that he was the agent of the defendant *to take applica-* "*tions* for insurance in the company, and receive the cash per- "centage to be paid thereon."

"Rowley stated verbally to the agent, the facts necessary to "meet the requirements of the rules of the company and in- "formed him that the premises *were* incumbered by mort- "gage."

Rowley signed the application in blank, and the agent afterwards filled it up, and inserted "what was not the fact, and in "violation of his instructions, that there was *no* incumbrance on "the premises."

The court continues, "considering the authority of Dean in "its most limited sense, 'to *take* applications for insurance,' I "think he must be considered the agent of the insurer rather than "of the assured in filling up the application."

This certainly does violence to the ordinary use of the word take.

It does, if anything, still greater violence to every analagous case which had preceded it.

Judge Fullerton admits that these two cases are in conflict with the decisions which had gone before.

Smith vs. *Empire Ins. Co.* 25 Barb. 497, was an action on a policy of insurance. The original application was brought by the plaintiff to one V. C. the company's agent, in an incomplete state, with the understanding that the agent was "to fill in the "rest of it when he got where he could write." Pursuant thereto, the agent afterward inserted what he thought proper to make the application complete, including a statement that "there was "no incumbrance except the Petrie mortgage," which was not true in fact. The application was made a part of the policy. It was held that the plaintiff constituted V. C. his agent to complete the application, and was responsible for what he in good faith inserted, and that the policy was avoided by such false statement.

The case of *Brown* vs. *The Cattaraugus Mut. Ins. Company* 18 N. Y. 385, *immediately precedes* the case of Plumb vs. same company, above quoted. They present a most remarkable instance of judicial summersault. Ide was the company's agent in this case, also, and drew up the application, making the survey of the stores mentioned in the application, and all the measurements of the distances of the stores from other buildings; that when the application was made and signed, Ide stated to Brown that the application was correct and contained all that the company required, that the plaintiff had nothing to do or say about making or preparing the application or making the measurement or survey; that when the application was presented to the plaintiff to sign, he stated to Ide that he did not know anything about the rules and regulations of the company, to which Ide replied that he was agent and surveyor; that the application as prepared, was all the company required; that the plaintiff then said that relying on the correctness of Ide's statements, as to the sufficiency of the application he would sign it; that he did sign it; that Ide forwarded it to the company's office and the policy was issued on it, and delivered by Ide to the plaintiff.

At the trial it was proved that there were several buildings within ten rods of the insured property, which were not mentioned in the application; and also that several buildings which were mentioned in it, were nearer than the distance stated.

It was claimed that the facts created an *estoppel against the defendant's alleging* a breach of the warranty.

Thereupon the court holds:

"*If the doctrine of estoppel could have such an application*,

"*it would entirely abrogate that established rule, that parol* "*evidence is not admissible to contradict or vary a written* "*contract.*"

"*The acts and declarations of the defendant's agent,* "*were certainly not entitled to any greater force than an* "*express verbal agreement—to the same effect—between the* "*defendant acting by him, and the plaintiff would be; and* "*if the latter would not be, the former is not a basis for* "*the principle of estoppel.*"

"An estoppel against proof, that there were other buildings "than those mentioned, endangering the safety of the stores, as "to fire, within ten rods, *would necessarily assume that such* "*was the understanding and agreement of the parties. It* "*could not rest upon any other idea. The evidence to* "*raise it, would, therefore, inevitably contradict the con-* "*tract.* If such was a part of the contract, it should have been "expressed in the writings."

The court continues: "No fraud is imputed to the agent, in "the bill of exceptions; and if it were otherwise, *it is difficult* "*to see how the plaintiff could be allowed the benefit of a* "*part of the contract of insurance, and the defendants be* "*denied benefit the residue, as it is set forth in the papers.* "The application is, as it is expressed therein to be, the applica- "tion of the plaintiff; the signature of the agent only imports that "he procured the application for the company; *and when the* "*plaintiff seeks to enforce the contract of insurance, he* "*must take it according to its terms; and submit to what-* "*ever makes against him as well as assert whatever makes* "*in his favor.*"

The argument is absolutely unanswerable. It is the inevitable result of an unquestioned rule of law.

It accords with every respectable precedent.

It expresses the utter fallacy of the argument in the case of Plumb vs. same company, which follows it, and of the stronger doctrine in Rowley *vs.* Empire Insurance Co., *supra.*

It is, throughout, strongly analagous to the case at bar.

If the position taken in the Circuit Court is to be affirmed as a correct exposition of the rule of law, it will be a precedent just as applicable to litigated cases on promissory notes, and other written contracts. In all these cases, will the statements—the parol agreements—of the parties be admissible to "*estop*" each other, and hence to contradict and vary the written contract.

It has ever been held that the written contract shall be an estoppel of all contemporaneous agreements.

This new rule is just the converse. It turns the law upside down. It is an attempt to engraft a fallacy, an absurdity on the law.

It proposes to pervert an established principle, in order to cater to the popular (*non sequitur*) argument: "The compa-
" ny has issued its policy, therefore it must pay."

It is believed, however, that these two decisions in New York have not met with much favor. So far as is known, the Supreme Court of Iowa, is the only court which has cited and affirmed them. This is very distinctly done by that court in the case of *Mary L. Miller* vs. *The Mutual Benefit Insurance Co.*

The case is not yet in print, but a certified copy of the opinion is now before us.

In addition to a citation of the New York opinions, it attempts to give some reasons, for the innovation, an effort which the New York judges did not attempt.

The success of the Iowa court in its attempt, will appear from the following extracts from the opinion :

"Just principles of public policy require that these compa-
"nies should be held to a strict degree of responsibility for the
"acts of their agents. They will thus be led to the exercise of
"greater circumspection in the selection of agents, and *the*
"*masses* will, in part at least, *be relieved from an annoying*
"*importunity, which often leads them to procure policies*
"*without the full concurrence of their judgment, and in*
"*opposition to their best interests.*" * * *

"It is quite true, that the technical constructions which have
"pertained with reference to contracts of this kind, blocking the
"pathway to justice, and leading to decisions opposed to the
"general sense of mankind, should be abandoned *and that these*
"*corporations grown opulent from the scanty savings of*
"*the indigent*, should be held to the same measure of respon-
"sibility as is exacted of individuals!!"

The courts are to become guardians for the foolish masses in order that they may not be led "to procure policies without the "*full concurrence of their judgment* and in *opposition to their best interests.*"

The "masses" are to be taken care of and so also are "*cor-*
"*porations grown opulent from the scanty savings of the*
"*indigent.*"

The opinion has the merit of honesty. It gives the true reason for overslaughing an established principle by a thin pretense.

In order that "the plaintiff may have the benefit of part of "the contract, and the defendant not have the benefit of the "residue," it assures us that these opulent corporations "should be held to the same "measure of responsibility as is exacted of individuals."

Poor and illogical as these reasons are, they are *the very best reasons*, and the ONLY APOLOGY for this class of decisions.

Authorities on the other hand are numerous and are, we submit, sound in principle. We refer especially to *Vose* vs. *Eagle, Life and Health Ins. Co.*, 6 Cushing, Mass., 42; *Smith* vs. *Insurance Company* 24 Pa. State 320; *Mitchell et al.* vs. *Lycoming Ins. Co.* 5 Pa. State 402; *Lowell* vs. *Middlesex Mut. Fire Ins. Co.* 8 Cush. 127; *Forbs* vs. *Agawam Ins. Co.* 9 Cush. 470; *Lee* vs. *Howard Ins. Co.* 3 Gray 583; *Jennings* vs. *The Chenango County Mut. Ins. Co.* 2 Denio 75; *Vandervorst* vs. *The Columbian Ins. Co.* 2 Caines 155, *Cheviot* vs. *Barker* 2 Johns 346; *Higginson* vs. *Dall* 13 Mass. 96, 172; *Weston* vs. *Emes* 1 Taunt 115; *Athertan* vs. *Brown* 14 Mass. 152; *Parks* vs. *General Ins. Co.* 5 Pick. 34; *Flinn* vs. *Tarbin* 1 Moody & Malk. 367.

II.

Let us turn to another cause of error assigned.

The 9th question in the application, is as follows: "Has the "party ever had any serious illness, local disease, or *personal* "*injury?* If so of woat nature and what age?" This is answered "No."

It will be seen by the record, that there was evidence tending to show that in 1862, Malinda fell from the top of a Pecan tree, a distance of about forty feet, that she was taken up insensible and was confined to her bed for some time thereafter.

It will, also, be seen that, against the objections of defendant, the court propounded question number 3 for the special verdict of the jury, viz: "were the effects of such fall temporary "and had these effects wholly passed away, without influencing or "affecting her subsequent health or length of life, prior to the "time when the application for insurance in this case was taken."

In instruction number 5, the court says to the jury: "Now the "defendant contends that the evidence shows, that in 1862, "when she was about 14 years of age, she fell from a high tree "and received serious personal injuries. The plaintiff denies "that the injury caused by the fall was serious or that it per-"manently affected her health, or that any vestiges of it or its "effects remained at the time the application was taken."

"If the effects of this fall were temporary and had entirely "passed away, before the application was taken, and if it did "not affect her health or shorten her life, then the non-disclosure "of the fall is no defense to this action. On the other hand, "if the effects of the fall were not temporary and remained "when the application was taken, or if the fall affected the gen-"eral health or was so serious that it might affect the health or "shorten the life, then the non-disclosure of the injury caused "by it, would defeat any right of recovery on the policy, al-"though the failure to state the facts of the fall was not inten-"tional or fraudulent."

It will be seen from the foregoing that the court instructed the jury that they were to be the judges as to the seriousness or extent of any unreported personal injury; to consider how far it affected the health or life; that they were to weigh its effect as increasing or not increasing the responsibility of the insurance; that temporary injuries were to be disregarded, and only those considered which were permanent or which might affect the life or health of the assured in after years.

In effect it said to the jury: It is true that the application is part of the policy, made so by the express terms of the latter; that that policy recites that it is issued upon the faith of the truthfulness of answers and statements in the application; it is true that the policy provides that if these statements shall be found *in any respect untrue*, then the policy shall be null and void' that careful suggestion was made to the applicant of such a condition in the original paper; it is true, gentlemen, that all these matters formed a part of the contract between the parties, but, nevertheless, you are to judge how far these questions and matters enquired of are material?

We contemplate here an Association which has made life insurance its specialty through a quarter of a century; whose appropriate business it has been carefully and accurately to systematize the principles which shall enable it to estimate longevity; which from a comparison of a multitude of examples, has learned to estimate in figures, the probable hereditary transmission of certain diseases: the effect of different occupations upon the life and health; the probable result of the various forms of accidental injury, as creating predisposition to disease; whose experience has taught it how to place an average pecuniary value on each different form of injury, on its extent, its duration and the time

when it happened; this Association proposes to issue life policies. and says to each applicant, "give us accurate answers to all the questions which we propound; before we can accept or reject your application or fix your rate of insurance, you must inform us truly as to the facts of which we enquire; your personal and family history are as material as your age." The applicant answers untruly, it may be from carelessness, or it may be wilfully. The consequences are the same. The policy is issued to a person in name, who differs from the person described in the application, just so far as the facts are conceded or perverted. "There is no contract unless the parties thereto assent," declares the principle which lies at the base of every contract. Where is the assent here?

With such a case (or at least possibly such a case,) the jury which tried it, are instructed that they may pass upon the materiality of the answers: may in effect, make a new contract for the parties and then enforce it by their verdict.

Were there no precedents, the underlying principle is so broad and so near the surface, that there would be no room for doubting the error of such a position.

It is claimed by the defence that all the statements in the application are EXPRESS WARRANTIES.

Phillips on Insurance, Sec. 754, defines an express warranty to be "*an agreement expressed in the policy whereby the "assured stipulates that certain facts are, or shall be true,* "or certain acts shall be done in relation to the risk. It may "relate to an existing or past fact, or be promissory and relate "to the future."

Sec. 755 declares that "it is not requisite that the circum-"stance or act should be material to the risk," and quotes from Lord Eldon the statement that "it is a first principle of the "law of insurance that if there is a warranty, it is a part of the "contract that the matter is such as it is represented to be. The "materiality or immateriality signifies nothing."

Sec. 756 holds that: "An express warranty is always a part "of the policy, but like any other part of the express contract "may be written on the margin, or contained in proposals or "documents expressly referred to in the policy and so made a "part of it."

In Sec. 762 it is declared to be "another distinction of an "express warranty or condition from a representation, that an "*express warranty must be strictly, and, it is even said, "literally complied with.*"

Quoting from Lord Mansfield: "A warranty must be strictly "complied with, nothing tantamount will do."

From Justice Buller: "It is a matter of indifference whether "the thing warranted be material or not, but it must be literally "complied with."

From Justice Ashhurst "The very meaning of a warranty, is "to preclude all questions whether it has been *substantially* "complied with; it must be literally."

And from Lord Eldon: "When a thing is warranted, it must "be exactly what it is stated to be."

Again in Phillips, Sec. 893 "The statements of a third "party, put in by the assured as constituting, with his own state-

"ments, the basis of the contract, and so referred to in the "policy, *have the character of a warranty of the facts* "*stated;* and if the party so referred to by the assured, and "whose positive statements are thus made a part of the contract, "makes a false statement, *the policy is void*"

"As where the person on whose life insurance was effected, by "another person, made a false statement of the name of his "medical attendant."

And yet, under the ruling of the court below, the jury would have had a right to hold this answer, touching this matter of medical attendant, as immaterial, unless it could be shown that the life or health of the applicant was affected thereby, or the risk increased by the now disclosure.

We refer again to the same author, Sec. 542: "A misrepre- "sentation or concealment by one party of a fact specifically in- "quired about by the other, though not material, will have the "same effect in exonerating the latter from the contract, as if the "fact had been material, since by making such inquiry he implies "that he considered it to be so."

And Sec. 902: "Under the condition of forfeiture by reason "of untrue statements, the policy and the premiums paid "upon it, are forfeited, though the untrue statement is honestly "made, and is believed to be true by the party making it or "answerable for it."

See also Smith's leading cases, Vol. , I p. 635, 636, 637, 638, and the authorities there cited.

As to the difference between representations and warranties, and the effect of the latter, we quote from p. 638: "When the "representations of the insured are substantially true, the policy "will not be vitiated by mistakes in immaterial particulars. A "*warranty*, on the other hand, must be literally fulfilled, and "any breach, either in form or in substance, will avoid the insur- "ance. It is therefore important to distinguish between a war- "ranty and representation. A representation is a collateral "statement of a fact material to the contract, while a warranty "is a stipulation forming part of the contract, and is construed "as a condition. All statements contained in the policy itself, "are *prima facie* warranties, while extraneous statements are "regarded merely as representations, even when made formally "in writing, and in answer to written or printed questions, pro- "pounded by the insurers. But although statements, which are "not ordinarily introduced into the policy, are ordinarily collateral "to the contract, they may undoubtedly be incorporated with it "by express agreement, and will then cease to be mere represen- "tations, and become warranties. A reference in the policy to "a representation, will not, necessarily make it a part of the "contract, or render it absolutely binding on the insured, for the "intention may, and ordinarily will be presumed to be, merely "to put its existence as a representation beyond question and not "to give it another and more unfavorable character. ***But when "the representations of the insured, are expressly referred "to in the policy, as forming a part of the contract, they "will acquire the character of warranties, and invalidate the "insurance, unless strictly complied with, whether they are "or are not material to the risk assumed by the insurer.***" See also authorities there cited.

III. Kents Com. *p. 288 holds the same doctrine.

The case of *Mi'es, et. al.* vs. *Conn. Mut. Life Ins. Co.*, III Gray 580, is a decision upon precisely the same form of policy with the case at bar. It is there decided that: "Statements in "an application for life insurance 'upon the faith of which' the "policy is expressed to be made, with a stipulation that, if they "shall be found in any respect untrue, the policy shall be void, "are warranties, and if untrue, *even in a point immaterial* to "the risk, avoid the policy."

Chase vs. *The Hamilton Ins. Co.*, VI Smith, 52, although a case of fire insurance is also in point.

Daniel, et. al. vs. *Hudson River Fire Ins. Co.*, XII Cush. 416, is parallel with the last.

Chancellor Walworth held in *The Farmers' Ins. and Loan Co.* vs. *Snider*, XVI Wend. 481, that: "A warranty on the "part of the insured, whether express or implied, is in the nature "of a *condition precedent* and must be *strictly* complied "with."

The Supreme court of Iowa has enunciated the doctrine and effect of warranties with clearness and precision in the case of *Stout* vs. *The Fire Ins. Co. of New Haven*, XII Iowa, 383, as follows: "The stipulations in policies are considered express war- "ranties. An express warranty is an agreement expressed in the "policy, whereby the assured stipulates that certain facts relat- "ing to the risk are, or shall be true, or certain acts relating to "the same subject, have been or shall be done. *It is not requis- "ite that the circumstance or act warranted should be ma- "terial to the risk.*"

The above language is endorsed as quoted from VI Wend. 488, in which Savage Ch. J. quotes from Lord Eldon the following: "Lord Eldon says, it is a first principle in the law of insurance, "that if there is a warranty, it is a part of the contract, that the "matter is such as it is represented to be. The materiality or "immateriality signifies nothing. The only question is, as to the "mere fact."

Vose vs. *The Eagle Life and Health Ins. Co.*, VI Wend. 42, as its title indicates, is a case of life insurance, and so pertinent that it is a temptation to quote the case entire. The brief of counsel for defense is an exhaustive citation of authorities, involving the points in issue.

We cite further *Huckman* vs. *Fernie*. III Meeson & Welsby Ex. 505; *Hutton* vs. *Waterloo Ins. Co.*, I Foster & Finlaison, 735.

Cazenove vs. *British &c. Assurance Co.*, 6, C.B.(N.S.)437.

Anderson vs. *Fitzgerald*, XVII Jurist, 995.

Wilson vs. *Conway Ins. Co.*, IV Rhode Island, 141.

Angell on Fire and Life Insurance, Sec. 307, &c.

Authorities might be added to an almost unlimited number; but it is unnecessary to multiply them further. So far as we have examined, they all hold the same doctrine.

The plaintiff will probably quote as opposed to this position, the case of *Wilkinson* vs. *Conn. Mut. Life Ins. Co.*, to be reported in 30 Iowa.

It was a suit on another policy, on the same life as the cause at bar.

The defense as to the untrue answer made touching the mother's age, was not made in that case, no question touching that matter having been asked in the application.

Touching the matter of the personal injury, the question in the application in that case, was: "Has the party ever met with any "accidental or serious personal injury, and if so, what was it?"

The judge had instructed the jury that it was the duty of plaintiff and wife to answer each and every question truthfully, and if they did not do so on *every material matter or question*, then plaintiff cannot recover. And also, that the answers "must be "*substantially true*; that any mis-statement upon any "*material matter* would avoid the policy."

Judge Cole, in the Appellate court said: "If the cause "had been submitted to the jury for a general verdict, upon these "instructions without more and they had found for plaintiff, it "would be our clear duty to reverse. Under the terms of the "policy in this case, the answers to the questions contained in "the application became warranties, not that they were *substan-*"*tially true as to the material matters*, but that they were true "in every particular, although in the opinion of the jury, such "particulars wherein they were untrue, may not have been mate-"rial to the risk."

The court then cites authorities in support of this position, and continues: "But the jury were not required by the court "or the parties, to return a general verdict."

In short, the court holds, that inasmuch as the jury were required to find *only* as to certain independent facts, "having "no connection or relation whatever to any proposition of law,

"no prejudice could have resulted to defendant by reason of the "refusal to give proper or the giving of improper general instruc- "tions."

In the case at bar, the jury were required to give a general verdict, and hence the opinion of the court is in fact favorable for the appellant in this case.

Some remarks follow by the court, touching the construction of the words "any accidental personal injury," judge Cole insisting that the language is to have a "'reasonable construction,' "that it would not be understood to refer to a simple burn upon "the hand or arm, in infancy, or to a cut upon the thumb or "finger in youth," &c.

The language of the question in this case, renders any such discussion unnecessary.

The simple question to be determined, was whether Malinda in 1862, by falling at a great heigth from a tree, met with a personal injury, which was "serious" at the time when it occurred; not whether it was material as affecting the hazard of the insurance; and not whether its effects were temporary and passed away without permanent injury.

These were questions which the company was entitled to determine for itself, either on the statement of the fact alone, or by seeking further information.

It was entitled to know the truth, and the application did not state it.

Respectfully submitted.

GILLMORE & ANDERSON,
GEO. G. WRIGHT.

Attorneys for Appellant.

IN SUPREME COURT OF THE UNITED STATES.

HENRY WILKINSON, Appellee,

vs.

THE UNION MUTUAL INSURANCE COMPANY, OF MAINE, Appellant.

On Error to the Circuit Court of the United States for the District of Iowa.

McCrary, Miller & McCrary and John H. Craig and W. I. Cochran, Attorneys for Plaintiff and Appellee.

Gillmore & Anderson and George G. Anderson, Attorneys for Defendant and Appellant.

ARGUMENT FOR PLAINTIFF AND APPELLEE.

This suit is on a policy of life insurance taken by plaintiff, Henry Wilkinson, on the life of his wife, Malinda Jane Wilkinson, of date June 1, 1867. The wife

died January 2, 1869. On the trial, the defendant admitted the execution of the policy, the death of Malinda Jane Wilkinson, and the notice and proof of her death to defendant, and defendant assumed the burthen of making out the defenses set up in the answer, and claimed and took the opening and closing both as to the introduction of evidence and the argument to the jury.

The defenses are based on the answers contained in the application signed by plaintiff and his wife, which defendant claimed and the court held to be warranties.

The evidence of defendant was confined to three points of defense:

1. Defendant claimed that at the time the application was taken, to wit: May 23, 1867, said Malinda Jane Wilkinson had consumption, or disease of the lungs, and that the answers to questions 8, 9, and 11 of the application, which states that she had never been affected with disease of the lungs, or consumption; and was not then afflicted with any disease or disorder whatever were untrue, and hence that the policy was void.

If the defendant could have established this fact, it would have been a meritorious and honorable defense. The fate of this defense is disclosed by the third special finding of the jury. At the request of defendant the court submitted the following question to the jury:

"Did Malinda Jane Wilkinson have consumption or lung disease prior to May, 1867?"

"No."

It is not even claimed by the counsel for defendant that the charge of the court, or a single word uttered by the court to the jury, could have misled or influenced in the slightest degree the jury in deciding this plain and simple issue of fact. As the answers given to said questions in the application were true, there could be no breach of any warranty contained in those questions. Thus fell the only defense which the insurance company would have presented if its sense of justice, as well as its regard for its own reputation, had been sufficient to have prevented it from resorting to bald technicalities to evade the payment of a just and honest loss. By reference to the case of Wilkinson vs. Connecticut Mutual Life Insurance company, to be reported in 30 Iowa, quoted in the argument of defendant's counsel in this case, the court will see that the same identical issue was passed on by the jury in that case and decided in the same way.

II. Another of the three defenses on which defendant relied on at the trial, is based on the answer to question nine of the application. The question and answer are as follows :

"Has the party ever had any serious illness, local disease, or personal injury? If so, of what nature, and at what age?"

Answer—"No."

Defendant claimed that said Malinda Jane Wilkinson did sustain serious personal injuries by falling from a tree in 1862, when she was about fourteen years of age. This was denied and controverted. At the request of the defendant's attorneys the court submitted

this plain issue of fact to the jury. The following is the question submitted, and the answer of the jury:

"Did Malinda Jane Wilkinson, in the year 1862, receive a serious personal injury by falling from a tree?"

Answer—"Yes, injured, not seriouly."

The counsel for defendant claim that the court erred in its instruction as to this point of the defense, and also in submitting to the jury question three, (being the second special finding in the verdict). This is the second branch of their printed argument. It is a misconception of the point of controversy presented by the record, as well as a misconception of the instructions of the court. It assumes that there is a breach of warranty, and then goes on through eight or ten pages producing authorities that the breach of a warranty avoids the policy, when the real points of inquiry are: What is the precise thing warranted? And has there been any breach at all? It is not necessery for us to examine any of the authorities and cases cited in this branch of their argument. The court below expressly instructed the jury as follows:

"The law is that the specific questions asked by the applicant must be truly answered; and if answers in any respect untrue were given to such questions, they would avoid the policy, although relating to matters not materially affecting the risk, and although they were not designedly untrue, or made with a view to deceive or mislead the company."

Why did not the counsel add the foregoing to their long list of authorities?

According to the true grammatical construction of said question nine of the application, the adjective "serious" qualifies not only the word "illness", but also the words "disease" and "injury". This was conceded in the court below; the counsel admit it in their printed argument, and it is required by the rules of legal construction as applied to warrantes and conditions in contracts of insurance, as we will show below, in the second answer which we propose to submit to this part of appellant's argument. Then, leaving out of said question nine, what is not pertinent to this issue, it stands: "Has the party ever had any *serious* personal injury?" Answer—"No." Was this answer true or false? That was the precise issue submitted to the jury on the evidence. The counsel themselves requested the court to submit it specially to the jury, using the word "serious" to qualify "personal injury". The jury found that the answer given to question nine was true—that Malinda Jane Wilkinson had not had any serious personal injury, and hence there was no breach of warranty. The jury did not pass upon the materiality of the answer to said question nine; they simply found that the answer given in the application was true. This special finding of the jury puts an end to this part of defendant's defense, unless the defendant can show this court some reason for setting the special finding aside. It cannot be set aside as contrary to the evidence; the counsel knew enough about the evidence to be well aware that it was useless to have it set out in the record, with the view of raising such a point. By referring to the case of Wilkinson vs. Connecticut Mutual Life Insurance company, cited above,

the court will see that this was the second jury that found this identical issue of fact in the same way. But the counsel claim that there was error in the instructions of the court as to this part of the defense. This is not true, as we will endeavor to show below. But even if it were true, it is not sufficient unless the counsel show, further, how such alleged error could have misled the jury, or have affected in any way their answer to the plain and simple question of fact submitted to them at the instance of the counsel themselves. They themselves wrote it out. We will quote it again: "Did Malinda Jane Wilkinson, in the year 1862, receive a *serious* personal injury by falling from a tree?" Here is a simple issue of fact—as simple and square as ever was submitted to a jury. Its decision did not require the application of a single legal principle. Instruction 5, of which the counsel complain, was not pertinent to the specific and single issue contained in the question thus submitted to the jury, and was not so designed by the court. It was given to direct the jury in case they should find from the evidence that the assured had sustained a *serious* personal injury. As they found that she had not, that was the end of the matter, and made it useless to go into the inquiries suggested in the fifth instruction.

To say that the jury went into these inquiries in answering this specific question, involves the absurdity of saying that after deciding that the assured had not received any serious injury, they proceeded to inquire into the effects on her life and health of a serious injury which she did *not* receive.

If the jury had found that the assured had received a serious personal injury, and notwithstanding had found a general verdict in favor of the plaintiff, then the counsel might legitimately lay the blame on instruction five; and if they could show error in that instruction, they would be entitled to say that they were prejudiced by such error. But when the jury effectually disposed of this part of the defense, without going into the questions suggested in instruction five, it is difficult to see how that defense was prejudiced even admitting that there was error in said instruction. This finding was the decision of an independent question of fact having no connection with, or relation whatever to, any proposition of law. This was one of the important points expressly held in the case of Wilkinson vs. Connecticut Mutual Life Insurance company, cited above.

In the argument of that case in the supreme court of Iowa, we admitted that there was error in one of the instructions. The court so held, but also held that the special findings were "independent facts having no connection or relation to any proposition of law," and were not affected by the error complained of, and affirmed the judgment below. The counsel claim that there was no general verdict in that case. This is true, but it does not help them, for the same court, in Carleton vs. Byington, 24 Iowa, 173, in which there was a general verdict, held the same thing, because the special findings showed that defendant, (Byington et al.), suffered no prejudice by the error complained of. The counsel quote from the opinion in Wilkinsin vs. Connecticut Mutual Life Insurance company, as follows: "If the cause had been submitted to the jury for a general ver-

dict on these instructions *without more*, and they had found for plaintiff, it would be our clear duty to reverse." But there was *more*: there were special findings which put an end to every defense which defendant presented. The instructions complained of did not effect these findings. And as the defendant in that case (as in this) had admitted the execution of the policy, the death, and notice and proof of death, it followed the plaintiff was entitled to judgment on the special findings, hence if there had been a general verdict in that case it would not have been set aside,—or if it had been, the plaintiff would still have been entitled to judgment for the same amount on the special findings. So in this case the plaintiff is entitled to judgment for the amount of the policy and interest, unless there was error as to and affecting the special findings, which put an end to defendant's defenses. In the first division of this argument we have shown the end of one of the defenses. We are now treating of another specific defense, and we submit, that as to this specific defense, that even if there was error in instruction five, it did not prejudice the defendant.

2. Our second answer to this point of the counsel's argument is that there is no error in instruction five. It gives the law correctly. It is true that when the jury found that the assured never had had "any serious personal injury", the inquiry as to the effects of such injury could not arise. But if the jury had believed, from the evidence, that the assured had had any "serious personal injury", then instruction five was legitimate and pertinent, to direct the jury as to whether such a serious personal injury was within the fair and reasonable construc-

tion of the ninth question in the application. The counsel here misconceive and mistake the point of controversy. It is not whether said question and answer is a warranty, or as to the effect of a breach of a warranty, but it is, What is the precise fact which the parties intended to warrant as true? or, in other words, What is the fair, just, and legal construction of said question in the application? Are the words "any serious personal injury" to be taken in their widest extension, or is the generality of the words to be restrained to the subject matter of the contract? Was the question designed to include every personal injury which, though it might have been serious at the time, was only temporary and soon passed away, and was perhaps forgotten? Or does it mean, in the language of the instruction, an injury "so serious that it might affect the health or shorten the life"?

In Wilkinson vs. Connecticut Mutual Life Insurance company, 30 Iowa, the following is what the court say on a similar point: "In other words, the real question is 'upon the construction of question fourteen in the application, to wit: 'Has the party ever received any accidental *or* serious personal injury, and if so, what was 'it?' The defendant claims that if the insured ever met 'with *any accidental injury* that will bar a recovery, because the application is a warranty that she never did. 'In this construction we do not concur; the language of 'the question is to have a reasonable construction in view 'of the purposes for which the question was asked. It 'must have referred to such an accidental personal injury as probably would or might possibly have influenced

'the subsequent health or longevity of the insured. . . .
'The rule is that such a construction is to be put on the
'language by the courts as an ordinary person of com-
'mon understanding would put upon it when addressed
'to him for answer. . . . . The language of the ques-
'tion must have a fair construction, and in the words of
'our statute (Rev. 3994) that sense is to prevail against
'either party in which he had reason to suppose the
'other understood it. This construction is not only in
'accordance with reason and justice, but it has the sup-
'port of the authorities in like cases."

The court then proceeds to cite authorities. We will quote but one:

"So in the case of Ross vs. Bradshaw, (1 Wm.
' Blackstone, 312). The warranty was that the party
' was in good health. The fact that twelve years before
' the party had received a wound which produced par-
' tial paralysis of the organs of retention of urine and
' fæces, but not such an injury as was calculated to
' shorten life or affect the vital functions, was held not
' to invalidate the policy."

In this case Lord Mansfield told the jury that the only question was whether the assured was in a *reasonable* good state of health, and such a life ought to be insured on common terms.

In Wall vs. Howard Insurance company, 14 Barb., 485, the court say: "Courts are liberal to the insured in
' giving interpretation to a warranty; and they have
' been strict in requiring the insurer who draws up the
' policy and deliberately chooses his own language to

'use such as will, in its literal understanding, clearly 'convey the intended meaning." This language is quoted and approved in Carter vs. Humbolt Ins. Co., 17 Iowa, 461.

Provisions which provide for a forfeiture, where the intent is doubtful, are to receive a strict construction against those for whose benefit they are introduced. (7 Hill, 254; 1 Sumner, 434; 4 Seld. 305.) Indeterminate forms of expression are to be understood in a sense subservient to the general purposes of the contract. (32 New York, 405.) Bacon says: "All words, whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the person." (Bacon's law Maxims, Reg. 10.) Powell states the same rule: "The matter in hand is always presumed to be in the mind and thoughts of the speaker, though his words admit of a larger sense. And, therefore, the generality of the words used shall be restrained by the particular occasion." (Powell on Contracts, 389.) Instruction 5 simply restrained the generality of the words "any serious personal injury," to the matter in hand—to the subject matter of the contract, and was only the application of the foregoing rules to the construction of said question 9 in the application. Any other construction would make the question operate as a snare, and, as Cole, Ch. J. forcibly says, in the case to which we have referred, "would bring a just reproach upon the courts, the law, the defendant, itself, and its business."

We therefore submit that there was no error in the instructions of the court as to this part of the defense;

or, at least, any error that affected in any way the disposition which the jury made of it.

III. It only remains to examine that part of the defense which relates to the mother of Malinda Jane Wilkinson. As the jury found that the mother did not die of consumption, there can be no controversy as to that part of the application. There remains the single point as to the age at which the mother died. There appears in a diagram in the application, in a column under the printed words "Age of mother at death," the figures "40." The jury found that the mother in fact died at the age of 23 years. The court permitted the plaintiff to introduce certain evidence—not to change or vary the terms of the contract, as the counsel argue—but to show that the defendant was not in a situation to avail itself of this answer to this question in the application, although it was untrue; or, in other words, that the defendant was estopped from making this defense. The admission of this evidence, and the instructions of the court in regard to it, the counsel claim was error.

The evidence set out in the bill of exceptions, shows that one Ball, in 1867, was the agent of the defendant in the city of Keokuk, and that his territory included Lee county in Iowa, and Hancock county in Illinois, and that during that time he was the only agent of defendant in that territory; that he had an office in the city of Keokuk, and advertised himself as the agent of defendant; that the company forwarded him blank applications; that he was in the habit of filling applications, and when received forwarding them to the company

through a general agent at Davenport, Iowa, and when the policies came back he delivered them to the assured; that he acted for defendant in collection of premiums and making proofs of loss; and that he made out the application in the present case.

The receipt by defendant of all premiums and dues on this policy was admitted in the trial. (See bill of exceptions.)

The special finding of the jury shows that the agent of the company, in taking and filling this application, put the questions to the applicant, and wrote down the answers; that when this question was put, the applicant answered that she did not know, and could not answer these questions [in regard to her mother], as her mother had died when she was a child, and she made no statement to the agent in these respects; that the figures "40" were put down by the agent on his own judgment, *without the assent of the applicant, and that the applicant, when she signed the application, did not know how the agent had written the answer.* The evidence on this point (set out in the bill of exceptions) more than sustains this finding of the jury.

These being the facts, it is obvious that to sustain this part of appellant's defense would be a denial of justice, and allow the insurance company to take advantage of the wrong of its own agent.

We proceed to show that the ruling of the court below on this point is as abundantly sustained by the authorities in like cases, as it obviously is by common sense, reason, and justice.

The counsel admit, in their printed argument, that the later decisions of New York sustain the ruling of the court below. They claim, however, that the cases of Plumb vs. the Cattaraugus Co Mut. Ins. Co., 18 N. Y., 392, and Rowley vs. the Empire Ins. Co. 36 N. Y., 550, have not met with much favor; that the supreme court of Iowa is the only court which has cited and affirmed them. They have been unfortunate in their examination of the authorities. Let us see: The latest decision on the subject, in Missouri, is Combs vs. Hannibal Saving and Insurance company, 43 Mo., 149. In this case a recovery was resisted on the ground of false representations and warranties; that the application stated the title to be an unencumbered fee simple title, when it was in fact an encumbered equitable title only. The questions were:

"What is the title?"

Answer—"Fee simple."

"Is your property encumbered, by what and to what amount?"

Answer—"No."

In reply to this defense the court permitted plaintiff, against the objections of defendant, to introduce evidence tending to show that one Rush solicited the insurance as agent of defendant; that plaintiffs apprised him of the true state of the title; that he filled the application in his own language, assuring plaintiffs that it was all right, and that plaintiff, believing it so, signed it without being aware that the words "fee simple" and "no encumbrance" were in it. There was a verdict for plaintiff

The supreme court say: "In our view the doctrine 'of estoppel *in pais* is applicable to the case, and ought 'to be applied as in the case of Plum vs. Cattaraugus 'Mut. Ins. Co., 18 New York, 392. . . . The doctrine 'of this case is affirmed by a subsequent decision of the 'same court in Rowley vs. Empire Ins. Co., 36 N. Y., '550. See, also, Horwitz vs. Equitable Ins. Co., 40 'Mo., 557, and Franklin vs. Atlantic Ins. Co., 42 Mo., '456."

Flanders on Fire Insurance, 180, states the doctrine thus: "An insurance agent acting within the scope of 'his authority, binds his principle *in making the survey 'and filling up the application*, and if the applicant truly 'represents the facts, and by the fault or negligence of 'the agent the application contains a material mistate-'ment, the company is estopped to take advantage of 'it." He then quotes numerous authorities to sustain the text.

In 2 American Leading Cases, fifth edition, 1871, commencing at page 914, contains the latest and most complete list and review of the cases on this subject which we have been able to find. It is there stated: "The better opinion would accordingly seem to be that 'the insurer cannot take advantage of the mistatement 'or omission of any fact which it was their duty to set 'forth and state correctly in view of all the circumstan-'ces; and that this will be true even when the defect 'occurs in the application or other document, which, 'though signed by the insured, is prepared by them-'selves, or by any one whom they have duly authorized, 'with a knowledge of or an opportunity to know all the

'material circumstances."

The following cases are then cited:

Rowley vs. Empire Ins. Co., 36 N. Y., 550; 40 N. Y., 557; Peck vs. New London Ins. Co., 22 Conn., 575; Beebe vs. the Hartford M. F. Ins. Co., 25 Conn., 51; the Iron Works vs. Phœnix Ins. Co., 25 Conn., 465; the Bank vs. Charter Oak Ins. Co., 31 Conn., 578; the Perry City Ins. Co. vs. Stewart, 7 Harris, 45; the Howard F. Ins Co. vs. Bruner, 11 Harris, 60; the People's Ins. Co. vs. Spencer, 3 P. F. Smith, 353; Franklin vs. the Atlantic F. Ins. Co., 42 Mo., 457; Combs vs. the Hannibal F. and M. Ins. Co., 43 Mo., 148; Beal vs. the Park F. Ins. Co., 16 Wisconsin, 241; also, Campbell vs. the Union Ins. Co., 40 New Hampshire, 333; Crane vs. the Nat. Ins. Co., 16 Maryland, 269.

It is stated that these and many other cases establish the doctrine "that when the insured is misled by the assurances or declarations of the agents of the insurers, equity will reform the contract, *or a recovery may be had on the ground of equitable estoppel at law.*" It is further stated that "*the principle has generally been stated to excuse the breach of a warranty growing out of questions propounded by the insurers.* But it will apply wherever the insurers seek to take advantage of a forfeiture of their own creation or default which they directly on indirectly shared."

That Ball, in making out the application, was the agent of the insurance company, and that the company is responsible for his acts while so doing, is fully established by the above cases.

This is the settled doctrine of New York. Rowley vs. Empire Ins. Co.; Masters vs. the Madison Ins. Co., 11 Barb., 624; Sepson vs. Montgomery County M. Ins. Co., 9 Barb., 191; McEwen vs. Montgomery County M. Ins. Co., 5 Hill, 101.

It has long been the settled doctrine of Connecticut, in Woodbury Savings Bank vs. Charter Oak Ins. Co., 31 Conn., 526. In this case this rule is declared to be the settled policy of that state by a long line of decisions. Dutton I. in delivering opinion, anticipates the argument of the supreme court in Miller vs. the Mutual Benefit Ins. Co., which the counsel for defendant have ironically quoted. He says that the courts of Connecticut have taken the ground that "*public policy and the protection of community*" require that this rule should be adopted. He proceeds: "A modern policy is a very com-'plicated contract. Before executing almost any 'other instrument of equal perplexity, the parties would 'deem it necessary to take the advice of able counsel. 'Frequently questions arise as to the proper construc-'tion of the terms used, which divide the opinions of the 'most learned jurists, yet the insured are bound, at 'their peril, however ignorant they may be on points of 'law, to give them their true legal construction. Now, 'we know from common observation that not one in a 'hundred of those who procure policies, give any atten-'tion whatever to the finely printed page containing the 'conditions of a policy. They cannot afford to spend the 'time required to study them over, and they take it for 'granted that they would not be enlightened if they 'should. They rely with full confidence, and whatever

'may be the law, or whatever stipulation may be insert-
'ed in the policy, they always will rely on the represen-
'tations of the agents, and always will regard them as
'the representatives of the company, and will always
'consider themselves as safe in doing whatever receives
'their sanction. These local agents, however, are under
'a strong temptation to use undue influence to increase
'their business, and at the same time secure, as far as
'possible, their employers from loss. . . . . This court
'have, therefore, in a series of decisions, held companies
'bound by the acts of local agents, whenever it could be
'done consistently with the evidence and rules of law."

This decision, too, has the merit of "honesty." Besides, it is *impartial*, and, unlike the Massachusetts cases on which the counsel rely, it does not "breathe a spirit of sternness toward the insured in marked contrast with the tone of the decision in New York, and still more with that prevailing in the courts of the western states." See the valuable note appended to Viele vs. Germania Ins. Co., 26 Iowa, 74.

The exact question presented and decided in Miller vs. the Mut. Benefit Ins. Co., 30 Iowa, is thus stated by Day Ch. J.: "Is an insurance company, transacting
'business through an agent having authority to solicit,
'make out, and forward applications for insurance, to
'deliver over policies when returned, and to collect and
'transmit, affected by the knowledge acquired by such
'agent when engaged in procuring an application, and
'bound by his acts at such time done with respect there-
'to?" After an examination of the authorities, this question is decided in the affirmative. In addition to

the extracts which the counsel have obliged us by quoting from the opinion in that case, we quote the following: "These companies select their own agents, require 'them to enter into bonds for the faithful discharge of 'their duties, and send them forth provided with blanks, 'and clothed with all the insigna of authority. If their 'ignorance or their cupidity leads them to recommend 'improper risks, it is more in consonance with reason 'that the loss should be borne by the company, than 'that the assured should be made the victim of the 'incompetency or the avarice of the agent. More es-'pecially is this true in view of the fact that the compa-'ny has the means of indemnity through the bond of the 'agent."

This has not only the merit of "honesty," but also of reason, common sense, and justice. The powers of an agent are *prima facie* coextensive with the business intrusted to his care. The doctrine that an agent employed and paid by an insurance company, advertising himself as such, having exclusive control of two populous counties; writing up hundreds of applications and transmitting them to the company and delivering the policies, collecting annual premiums and sending them to the company; making out proofs of loss; employing and paying the medical examiner; furnished with blanks, and employed and expected by the company to see that the application is properly made out; is to be considered as the agent of the insured, and not of the company, in making out the application, is an artificial and unwarranted assumption; it is setting a snare for the community. It has no foundation in truth and fact;

but is contrary to the truth and fact. It ought not to find, and will not find, a permanent place in an enlightened jurisprudence. Decisions which are not founded in truth, right, and justice, will not stand. The history of our jurisprudence gives us this assurance.

The record abundantly shows that the applicant and his wife, when asked the question in controversy, told the agent the exact truth, and declined to answer in any other way; that the agent, without their consent, and without their knowledge, inserted the answer on which the defendant depends, received the premium, and collected the annual premiums down to the death of the wife. This action of the agent was a fraud on the plaintiff and his wife. The parties cannot now be put in *statu quo*. There is no use for the principle of equitable estoppel, if it is not applicable to such a case. In addition to the authorities above cited, see Barnes vs. the Union Ins. Co., 43 New Hampshire; Campbell vs. the Mut Ins. Co., 37 New Hampshire, 35; the — Ins. Co. vs. Hall, 12 Mich., 202; the Howard Ins. Co. vs. Bruner, 11 Harris, 50; Keeler vs. the Niagara Ins Co., 16 Wisconsin, 523; the Ft. M. Ins. Co. vs. Schettler, 38 Illinois, 166; Columbia Ins. Co. vs. Cooper, 14 Wright, 331; Geib vs. International Ins. Co., 1 Dillon's C. C. Reports, 443, all showing that the knowledge of the agent is to be taken as the knowledge of the company, and that the company may be estopped by the acts of the agent.

The counsel state, in the course of their argument, that the contract "had not been reformed in equity." It is true that we did not go into a court of equity to

enjoin the defendant from setting up this defense. But it is stated in 2 American Leading Cases, 5th edition, 1871, page 595, that: "The same end may be attained in 'a legal tribunal through the doctrine of equitable es- 'toppel, which, as now administered, operates as an in- 'formal injunction on the assertion of rights which can- 'not be enforced with equity and good conscience." Many of the cases above cited is an illustration of this doctrine. No sound reason can be given why the plaintiff should be sent out of a court of law into a court of chancery to enjoin this defense, when the court of law can just as well give substantially the same remedy by the application of the doctrine of equitable. The spirit of the age tends to simplify the modes of procedure by which justice is administered, and has made many of the old "crooked ways straight."

The counsel for defendant insist strongly on the argument of Strong J, in Brown vs. Cattaraugus Co. Mut. Ins. Co., 18 N. Y., 385. It will be observed that all the other judges who concurred placed their decision on other grounds, and Roosevelt J. dissented. It is admitted that the case is overruled, and that the contrary doctrine is now firmly established in New York. The argument which the counsel endorse so vehemently is founded on a misconception, as well as a narrow and technical view of the law. It is one thing to claim that a contract is different from what is plainly written, and quite another to claim that facts exist in connection with some term, provision, or condition of a written contract which make it incompetent and unconscionable for one of the parties to avail himself of that term, provision or

condition. An estoppel does not deny any part of the contract, but admits it, and is matter in avaidance. The argument is not fairly stated. Its whole force is: that the party is not allowed to insist on a written provision or condition, by an estoppel which may be established by parol; and thus a provision of a written contract is avoided by a defense which is established by parol evidence. But this objection lies with the same force against every application of the doctrine of estoppel *en pais* to written contracts; to the doctrine of waiver as applied to any condition or provision of a written contract. It applies to even the defense of fraud as against a written contract, and to the correction of mistakes in written contracts; for the contract in both cases is written, while the fraud or mistake is established by parol proof. While it is true that the terms of a written contract cannot be contradicted or varied by parol, it does not follow that they cannot be affected by parol proof. Every general principle of law is modified in its practical applications and effects by the operation of certain other parallel general principles, which are just as firmly established and just as essential to the proper administration of justice. The harsher effects of each are thus mutually corrected or neutualized, and each is harmonized with justice. And it is because this mutual modification of general rules in their practical effects has been guided by the instinct of justice, and the wisdom gained from experience that the law may claim to be "the perfection of human reason."

The counsel think that this application of the doctrine of estoppel is just as applicable to promissory

notes as to contracts of insurance. If a promissory note was as complicated a contract as the ingenuity of insurance companies have succeeded in making a contract of insurance, perhaps the facts necessary to lay the ground for an estoppel, would be as often found to exist in connection with the former, as they are now found to exist in connection with the latter, and we would likely have as many legal precedents for the one as for the other.

We have thus examined the three defenses made by the defendant, and we submit that there is no error in the record as to any of them. The burthen was on deft. to make some one of his defenses good, and as it has failed to do this, it follows that plaintiff was entitled to judgment without the aid of the general verdict, and hence what the counsel say in their argument about there being a general verdict in this case, is fully answered.

The plaintiff's claim is just—the record does not leave that in doubt. We respectfully submit his case, believing that it is impossible that the highest court in the land will put itself in the way of the manifest drift of later decisions on the main point involved in this case, sustained, as they are, by reason and justice.

McCrary, Miller & McCrary,
J. H. Craig, and
W. J. Cochran,
Attorneys for Plaintiff.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNION MUTUAL LIFE INSURANCE CO., OF MAINE, PLAINTIFF IN ERROR,
vs.
HENRY WILKINSON, DEFENDANT IN ERROR.

No. —.

Error to the Circuit Court, United States, for District of Iowa.

BRIEF OF GEO. W. MCCRARY, FOR DEFENDANT IN ERROR.

I beg to submit, in addition to the argument of my colleagues, the following suggestions for the consideration of the court.

The suit is upon a policy of life insurance.

The defence was, in substance, that the answers to certain questions, found in the application for the insurance in question, were untrue, and that each and every of such answers were warranties.

I observe in the first place that the jury, by its special verdict, found that every one of the answers complained of as false, was, in fact, true, except the answer concerning the age at which the mother of the applicant died. This will at once appear upon reference being had to the record, which shows that the answers charged to have been false were the following:

1. The answer which stated that the mother of applicant died at the age of 40, it being averred that she died at 23.

2. The answer which stated that the mother died of fever, it being averred by defendant below that she died of consumption.

3. The answer which stated that the applicant had never "had any serious illness, local disease, or personal injury," it being averred that the applicant when a child about 14 years of age fell from a tree and received a severe personal injury.

By reference to the special verdict of the jury it will be seen that the jury found every one of these questions to have been truly answered, except the one as to the age of applicant's mother at the time of her death. This one answer, as written in the application, appears from the verdict to have been incorrect, and this one only.

Concerning this one question which was erroneously answered, (not, however, by the applicant, as we shall see hereafter,) it is well to observe that it belongs to a class of questions manifestly in many cases, and as clearly appears in this case, not within the personal knowledge of the applicant. Persons whose parents died when they were very young, must depend upon hearsay as to the age at which they died. The same is true as to the disease of which they died. In the very nature of the case the applicant can only be required in answering this class of questions, to state his belief as derived from others, and surely an honest mistake could not be justly regarded as fatal to the insurance.

The plaintiff in error complains that evidence was admitted by the court below to show that when the agent, in taking and filling up the application, asked the applicant the age of her mother at the time of her death, she answered, and answered truly, shat she did not know, except from hearsay, having been a slave, and a mere child when her mother died; and that thereupon the agent inquired of another person then present, and who knew the mother of the applicant in her lifetime, and at the time of her death, and had lived in the same family with her, and from her statements, and some other information as to the number and ages of her children, came to the conclusion that the mother was about 40 years old when she died, and so wrote it down, the applicant herself protesting that she did not

know and could not state her mother's age at death, except from hearsay.

These facts were proven by three witnesses, viz: Ball, Wilkinson, and Dr. Collins. Can any doubt be entertained as to the admissibility of this evidence? It is true that some of the earlier cases went upon the presumption that an agent of an insurance company, with power to solicit and take applications for insurance, was *exclusively the agent of the applicant*, although employed and paid to represent the company. Under the operation of this doctrine a dishonest or careless agent, by an error in filling up the application, could render a policy void, though the applicant acted in perfect good faith and paid his premiums with the utmost promptness. This doctrine was found so unjust and harsh in its practical operation, and so productive of injustice and oppression, that it became necessary for the courts to overturn it, and I think I hazard nothing in saying that the doctrine is now well settled that an agent who is authorized to receive, fill out, and forward applications, is to be regarded as the agent of the company, and not of the applicant, while filling up or preparing such application. Many of the more recent cases go farther than the court below has gone in this case, for they hold that an agent to take applications is the agent of the company in filling them up. In this case it appears that Ball was the agent of the company, not simply to travel over the country and solicit applications, but having an office at Keokuk, with power to solicit insurance, to fill up the applications, to forward the same to the general agent, when returned to receive them and deliver them to the assured, to collect and forward the premiums, and in case of loss to attend to the making and forwarding of proofs, and that he had the exclusive control of the business of the company in two counties, Lee county, Iowa, and Hancock county, Illinois. (See bill of exceptions).

Counsel for plaintiff in error insists that the court below allowed us to *vary the terms of a written agreement by parol.* This is a misapprehension. We stand upon the familiar

doctrine of estoppel. I suppose it will not be denied that an insurance company may be estopped by the acts of its agent within the scope of his agency. If it were not so, such a company could never be estopped at all, as all their acts are performed through the medium of agents.

If the agent of defendant was acting within the scope of his authority when he took and filled up the application in question, and if he received a truthful answer from the applicant to the interrogatory in question, viz, that she did not know her mother's age at time of her death, and if he failed to put down that answer, but inquired of others, and relying upon their statements wrote down 40 years as the age of the mother at death, then clearly the company is estopped from showing, as a defence to this suit, that the agent was mistaken, and that the mother of the applicant died at the age of 23 years.

It follows, therefore, that the material question is, whether the agent, while filling up the application, was representing his company or the applicant. I contend that this question was not left in doubt by the proof, the substance of which is set forth in the bill of exceptions, as it certainly is not doubtful viewed in the light of the authorities on the subject. In New York, as I have already said, some of the earlier decisions were the other way; but the growth of the business of insurance, the manifest injustice of the earlier rule, and the imperative demand for reform, rendered it necessary to overrule a number of the early decisions in that State, which was done in the case of Plumb *vs.* Insurance Company, (18 N. Y.,392.) From the decision in this case, delivered by Judge Pratt, counsel for plaintiff in error has quoted somewhat at length on page 7 of his brief. I call attention to this quotation, as well as to the full opinion itself. The same doctrine is reasserted with great force and clearness in Rowley *vs.* Insurance Company, (36 N. Y., 550.) In this case it was distinctly decided that an agent, whose power is limited to taking applications for insurance, is to be regarded as the agent of the company when he is filling up the blank, and

therefore as acting on behalf of the company. And the court say :

"Any other rule would be fraught with mischief. Insurance companies send out an army of agents to solicit business. Property-holders are waited upon by them at their residences, and it is not going too far to say that many of the applicants would be unable to make a proper application and survey to meet the rigid and elaborate requirements of these corporations, while experience shows that that they are not expected to do so."

Iowa has followed New York, and the doctrine for which I contend is now firmly established in the courts of that State. In the case of Bartholomew *vs.* Insurance Co., (25, Iowa, 207,) the rule was laid down that although an agent be only authorized to receive and forward applications, yet if he "undertakes to fill up the application, and is correctly informed by the assured in regard to an incumbrance on the property, and the assured is misled by the agent into supposing that his answers are correctly taken down, then the company having received the premium cannot set up the existence of the incumbrance as a defence to the action on the policy."

See also Anson *et al. vs.* Insurance Co., 23 Iowa, 84; Veille *vs.* Insurance Co., 26 Iowa, 9; also the recent case of Miller *vs.* Insurance Co., not yet reported, but quoted from by counsel for plaintiff in error on page 14 of his brief. This latter was a case of life insurance, and is directly in point. It is worthy of remark that if this court shall hold the opposite doctrine, we shall have in the State of Iowa one law for litigants in the Federal courts and another law for litigants in the State courts. We also rely upon the following authorities: Roth *vs.* Insurance Co., 6 McLean, 325; Masters *vs.* Insurance Co., 11 Barbour, 624; Beebe *vs.* Insurance Co., 25 Conn., 62; Woodbury Savings Bank, &c., *vs.* Insurance Co., 31 Conn., 517.

In the last-named case it is declared to be the settled policy of the law to regard local agents of insurance companies who

are authorized to procure and forward applications for insurance, as the agents of the companies, and not of the applicants, in any mistakes of the application made by them or by the applicant under their direction.

I refer also to Geib *vs.* Insurance Co., 1 Dellon C. C., 443; Miner *vs.* Insurance Co., 26 Wisconsin.

As to the second point made by counsel for plaintiff in error, I need add but a few words. It is claimed that the court erred in giving the following instruction:

"Now, the defendant contends that the evidence shows that, in 1862, when she (applicant) was about 14 years of age, she fell from a high tree and received serious personal injuries. The plaintiff denies that the injury caused by the fall was serious or that it permanently affected her health, or that any vestiges of it or its effects remained at the time the applications were taken.

"If the effect of this fall were temporary and had entirely passed away before the application was taken, and if it did not affect her health or shorten her life, then the non-disclosure of the fall is no defence to this action. On the other hand, if the effects of the fall were not temporary and remained when the application was taken, or if the fall affected the general health or was so serious that it might affect the health or shorten the life, then the non-disclosure of the injury caused by it would defeat any right of recovery on the policy, although the failure to state the facts of the fall was not intentional or fraudulent."

This instruction was without doubt correct. If an insurance company when sued upon a policy of life-insurance may inquire about every accident which has befallen the assured in the whole course of his life, and avoid payment upon showing that he ever at any time received an injury or hurt which was "at the time" regarded as serious, then there is not one life policy in fifty that is worth the paper upon which it is written. The doctrine of warranty has never been carried to this extent.

This precise point was discussed and decided in Wilkinson *vs.* Conn. Mutual Life Ins. Co. by the supreme court of Iowa. The opinion will doubtless be printed with the argument of

my associates. It lays down the only rule that will stand in the light of reason, viz, that the application must have a reasonable construction, and must therefore be held to apply to such personal injuries as might influence the company in deciding upon the propriety of taking the risk and not to long past, and perhaps long forgotten injuries, the effects of which have long since passed entirely away. Upon this decision and the authorities therein cited we confidently rely.

But a perfectly conclusive answer to the point under consideration is, that the jury found as matter of fact in their special verdict that the applicant never did receive a serious personal injury by falling from a tree, &c. They found that she was "injured, not seriously." Therefore, if there was error in the instruction, it was error without prejudice.

Respectfully submitted.

GEO. W. McCRARY,
For Defendant in Error.